Economic Development, Trade & Banking Committee

Wednesday, April 5, 2006
4:45 pm – 5:30 pm
306 HOB

Allan G. Bense
Speaker

Gus Bilirakis
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Speaker Allan G. Bense

Economic Development, Trade & Banking Committee

Start Date and Time: Wednesday, April 05, 2006 04:45 pm

End Date and Time: Wednesday, April 05, 2006 05:30 pm

Location: 306 HOB
Duration: 0.75 hrs

Consideration of the following bill(s):

HB 839 CS Homeowners' Associations by Kottkamp
HB 1019 CS Deceptive and Unfair Trade Practices by Pickens
HB 1109 Title Loan Lenders by Smith
HB 1553 Black Business Investment by Carroll
HB 7213 Quick Action Closing Fund by Transportation & Economic Development Appropriations Committee

According to rule 7.22(c), non-appointed members must file amendments by 5 p.m., Tuesday, April 4, 2006.
The Chairman requests that committee member amendments also be filed by 5 p.m., Tuesday, April 4, 2006.

NOTICE FINALIZED on 04/03/2006 15:08 by GOLDING.SARA

The Florida House of Representatives

Commerce Council

Economic Development, Trade & Banking Committee

Allan G. Bense
Speaker

Gus Michael Bilirakis
Chair

Agenda
April 5, 2006

I. Roll Call

II. Welcome and Opening Remarks

III. Consideration of the following bills :

HB 7213 – Quick Action Closing Fund
by Transportation & Economic Development Appropriations Committee and Representative Davis
HB 1019 CS – Deceptive and Unfair Trade Practices
by: Representative Pickens
HB 839 CS – Homeowners' Associations
by: Representative Kottkamp
HB 1553 – Black Business Investment
by: Representative Carroll
HB 1109 – Title Loan Lenders
by: Representative Smith

IV. Adjourn

308 House Office Building, 402 South Monroe Street, Tallahassee, Florida 32399-1300
(850) 414-9782

HB 7213
Davis, D.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7213 PCB TEDA 06-01 Quick Action Closing
SPONSOR(S): Transportation & Economic Development Appropriations Committee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Transportation & Economic Development Appropriations Committee	15 Y, 0 N	McAuliffe	Gordon
1) Economic Development, Trade & Banking Committee		Carlson	Carlson MWC
2) Fiscal Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

This bill provides new eligibility criteria for projects funded by the Quick Action Closing Fund. The new criteria requires eligible projects to:

- Be in a targeted high-growth and high-wage industry.
- Have a positive return on investment of at least five to one.
- Be an inducement for expansion or location in Florida.
- Pay an annual wage at least 125 percent of the private sector average wage.
- Be supported by the local community.

The bill provides that Enterprise Florida Inc. (EFI), shall determine the eligibility of each project based on the new criteria; however, EFI, in consultation with the Office of Tourism Trade and Economic Development may waive the criteria based on extraordinary circumstances when the project would significantly benefit the local or regional economy.

The bill also requires the Governor to consult directly with the Speaker of the House of Representatives and the President of the Senate before giving approval for a project.

The bill provides an appropriation of $50 million in general revenue to the Quick Action Closing Fund.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Limited Government – The bill increases eligibility criteria for projects funded by the Quick Action Closing Fund and provides an increased appropriation to the fund over prior fiscal years.

B. EFFECT OF PROPOSED CHANGES:

Present Situation:

The 1999 Legislature created the Quick Action Closing Fund (s. 288.1088, F.S.) within the Office of Tourism, Trade and Economic Development (OTTED) for the purpose of helping Florida to compete for high-impact business facilities, critical private infrastructure in rural areas, and key businesses in economically distressed urban or rural communities. Enterprise Florida, Inc. (EFI), evaluates proposals for the use of the Quick Action Closing Fund (QACF), makes recommendations to OTTED, and describes the nature of the business and its products or services, the number of jobs to be created and the annual average wages of the jobs, the cumulative amount of investment, the impacts of the business at the regional or state level or upon the state's universities and community colleges, and what role the incentive is expected to play in the business's decision to locate or expand in the state, or for a private investor to provide critical rural infrastructure.

Currently, eligibility criteria for projects funded by QACF are not provided in statute, but the criteria used by EFI require a project to:

- Be in a targeted industry as referenced in s. 288.106, F.S.;
- Have a positive payback ratio;
- Create 10 new jobs, and if an expansion, must expand jobs by at least 10 percent; and
- Pay an average annual wage at least 115 percent of the area or statewide private sector average wage.

Once EFI makes its evaluation and recommendation to OTTED, the director of OTTED must make a recommendation of approval or disapproval to the Governor. OTTED must also provide the Governor with proposed performance conditions that the project must meet to obtain the incentive funds.

The Governor must consult with the President of the Senate and the Speaker of the House of Representatives before giving final approval for using the QACF for the project and must recommend approval of the project and release of moneys from the QACF pursuant to legislative consultation and review requirements of s. 216.177, F.S.

Once approved by the Governor, OTTED enters into a contract with the business and establishes the conditions for the payment of moneys from the QACF. Conditions in the contract include those factors identified by EFI in its request to OTTED and also include sanctions for failure to meet performance conditions. EFI is responsible for validating the performance of the contract and reporting to the Governor and the Legislature within 6 months after contract completion.

According to EFI's 2005 Incentives Report, the QACF assisted seven businesses with locating or expanding in Florida. These businesses are creating and retaining 2,818 high quality jobs in Florida at an average expected wage of $45,273. In fiscal year 2005-2006, the QACF was appropriated $10 million.

Effect of Proposed Changes:

This bill provides new eligibility criteria for projects funded by the Quick Action Closing Fund. The new criteria requires eligible projects to:

- Be in a targeted high-growth and high-wage industry.
- Have a positive return on investment of at least five to one.
- Be an inducement for expansion or location in Florida.
- Pay an annual wage at least 125 percent of the private sector average wage.
- Be supported by the local community.

The bill provides that EFI shall determine the eligibility of each project based on the new criteria; however, EFI, in consultation with the Office of Tourism Trade and Economic Development may waive the criteria based on extraordinary circumstances when the project would significantly benefit the local or regional economy. The bill also requires the Governor to consult directly with the House Speaker and the Senate President before giving approval for a project.

The bill provides an appropriation of $50 million in general revenue to the QACF.

C. SECTION DIRECTORY:

Section 1. Amends s. 288.1088, F.S., providing new criteria for eligibility for the QACF.

Section 2. Provides a $50 million appropriation.

Section 3. Provides this bill will take effect July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The bill provides an appropriation of $50 million in general revenue to the QACF.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Companies that qualify for funding through the QACF will benefit from state funding for locating or expanding their company in Florida.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Line 34 of the bill uses the term "extraordinary circumstances" to describe the condition under which OTTED and EFI may waive eligibility criteria for an award under QACF. This term is not defined and may not provide sufficient guidance as to what constitutes the proper conditions for waiver.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

A bill to be entitled

An act relating to the Quick Action Closing Fund; amending s. 288.1088, F.S.; providing eligibility criteria for receipt of funds; requiring Enterprise Florida, Inc., to determine eligibility using specified criteria; providing for waiver of eligibility criteria under certain circumstances; requiring the Governor to provide evaluations of certain projects to the President of the Senate and the Speaker of the House of Representatives; providing an appropriation; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (2) and paragraphs (a) and (b) of subsection (3) of section 288.1088, Florida Statutes, are amended to read:

288.1088 Quick Action Closing Fund.--

(2) There is created within the Office of Tourism, Trade, and Economic Development the Quick Action Closing Fund. Projects eligible for receipt of funds from the Quick Action Closing Fund shall:

(a) Be in a targeted industry as referenced in s. 288.106.

(b) Have a positive payback ratio of at least 5 to 1.

(c) Be an inducement to the project's location or expansion in the state.

(d) Pay an average annual wage of at least 125 percent of the areawide or statewide private-sector average wage.

(e) Be supported by the local community in which the project is to be located.

(3)(a) Enterprise Florida, Inc., shall determine eligibility of each project consistent with the criteria in subsection (2). Enterprise Florida, Inc., in consultation with the Office of Tourism, Trade, and Economic Development, may waive these criteria based on extraordinary circumstances when the project would significantly benefit the local or regional economy. Enterprise Florida, Inc., shall evaluate individual proposals for high-impact business facilities and forward recommendations regarding the use of moneys in the fund for such facilities to the director of the Office of Tourism, Trade, and Economic Development. Such evaluation and recommendation must include, but need not be limited to:

1. A description of the type of facility or infrastructure, its operations, and the associated product or service associated with the facility.

2. The number of full-time-equivalent jobs that will be created by the facility and the total estimated average annual wages of those jobs or, in the case of privately developed rural infrastructure, the types of business activities and jobs stimulated by the investment.

3. The cumulative amount of investment to be dedicated to the facility within a specified period.

4. A statement of any special impacts the facility is expected to stimulate in a particular business sector in the state or regional economy or in the state's universities and community colleges.

5. A statement of the role the incentive is expected to play in the decision of the applicant business to locate or expand in this state or for the private investor to provide critical rural infrastructure.

(b) Upon receipt of the evaluation and recommendation from Enterprise Florida, Inc., the director shall recommend approval or disapproval of a project for receipt of funds from the Quick Action Closing Fund to the Governor. In recommending a project, the director shall include proposed performance conditions that the project must meet to obtain incentive funds. The Governor shall provide the evaluations of projects recommended for approval to the President of the Senate and the Speaker of the House of Representatives and consult directly with the President of the Senate and the Speaker of the House of Representatives before giving final approval for a project. The Executive Office of the Governor shall recommend approval of a project and the release of funds pursuant to the legislative consultation and review requirements set forth in s. 216.177. The recommendation must include proposed performance conditions that the project must meet in order to obtain funds.

Section 2. There is appropriated $50 million from nonrecurring funds from the General Revenue Fund in fiscal year 2006-2007 to the Quick Action Closing Fund for the 2006-2007 fiscal year.

Section 3. This act shall take effect July 1, 2006.

HB 1019 CS
Pickens

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1019 CS Deceptive and Unfair Trade Practices
SPONSOR(S): Pickens
TIED BILLS: None **IDEN./SIM. BILLS:** SB 2496

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	7 Y, 0 N, w/CS	Shaddock	Bond
2) Economic Development, Trade & Banking Committee		Olmedillo	Carlson MHC
3) Criminal Justice Appropriations Committee			
4) Justice Council			
5)			

SUMMARY ANALYSIS

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) authorizes a cause of action by a consumer against a business or individuals that engages in a described deceptive or unfair trade practice that harms the consumer. This bill requires a consumer who seeks to sue a motor vehicle dealer under FDUTPA to first serve that dealer with a written demand at least 30 days before filing suit. It also applies a number of existing provisions of FDUPTA to motor vehicle dealers.

This bill provides that it will take effect upon becoming law.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill increases the procedural requirements related to prosecuting a civil action against a motor vehicle dealer under the Florida Deceptive and Unfair Trade Practices Act.

B. EFFECT OF PROPOSED CHANGES:

Present Situation:

The Florida Deceptive and Unfair Trade Practices Act ("FDUTPA")[1] was enacted "[t]o protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce."[2]

Businesses and individuals are afforded broad protection from unfair or deceptive acts or practices under FDUTPA. FDUTPA prohibits such acts in "any trade or commerce,"[3] except as its own provisions may specifically exempt. The definition of "trade or commerce" in s. 501.203, F.S., on its face encompasses all advertising, soliciting, providing, offering, or distributing without limitation as to medium or subject matter.

Claims under FDUTPA can generally be brought either by the state through a state attorney or the Attorney General acting as "the enforcing authority,"[4] or by a private party who has allegedly suffered actual losses resulting from a FDUTPA violation.[5]

Current law does not require that a potential plaintiff contemplating a FDUTPA action send a demand letter and attempt to settle the action before filing suit against a motor vehicle dealer.

Effect of Proposed Changes:

This bill transfers all provisions relating to motor vehicles to Part VI, of ch. 501, F.S. For instance, section 2 reproduces s. 501.204, F.S., section 4 reproduces s. 501.2077, F.S., section 5 largely reproduces s. 501.211, F.S., section 6 reproduces s. 501.213, F.S., and section 7 is essentially the same as s. 501.2105, F.S.

The bill requires an individual to send a demand letter to a motor vehicle dealer prior to filing a civil action under FDUTPA against the dealer.[6] The applicable statute of limitations period for an action

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[1] Sections 501.201-501.213, F.S.
[2] Section 501.202(2), F.S.
[3] Section 501.204(1), F.S.
[4] Section 501.203(2), F.S. The state attorney is the default enforcing authority for FDUTPA violations within any particular judicial circuit. The Department of Legal Affairs ("DLA"), headed by the Attorney General, is the enforcing authority for FDUTPA violations occurring in or affecting more than one judicial circuit, and for single-circuit violations where the state attorney either defers to DLA in writing, or fails to act on the violation with 90 days of receiving a written complaint.
[5] A non-exhaustive list of some actionable acts, pursuant to s. 501.976, F.S., by a dealer are: represent directly or indirectly that a vehicle is a demonstrator; represent the previous usage or status of a vehicle to be something that it was not; represent the quality of care, regularity of servicing, or general condition of a vehicle unless known by the dealer to be true and supportable by material fact; represent orally or in writing that a particular vehicle has not sustained structural or substantial skin damage unless the statement is made in good faith and the vehicle has been inspected by the dealer; misrepresent warranty coverage; obtain signatures from a customer on contracts that are not fully completed at the time the customer signs or which do not reflect accurately the negotiations and agreement between the customer and the dealer; alter or change the odometer mileage of a vehicle; and sell a vehicle without disclosing to the customer the actual year and model of the vehicle.

under FDUTPA will be tolled by the mailing of the notice required by the bill for a period of 30 days for an individual claim or 45 days for a class action claim. Further, this bill requires the Department of Legal Affairs to prepare a sample notice for individual claims to be made available to the public.

Current law provides that it is an unfair or deceptive act under FDUTPA for a vehicle dealer to obtain signatures from a customer on contracts that are not fully completed at the time the customer signs or which do not reflect accurately the negotiations and agreement between the customer and the dealer. The bill modifies this language in two ways. First the bill provides that it would be actionable for a dealer to obtain a customer's signature on contracts that are not fully completed as to all material terms at the time the customer signs. Second, the bill provides an exception. This provision would not apply if, at the time of the transaction, the customer acknowledges in writing having read substantially the following notice:

> STATUTORY CONSUMER NOTICE: A vehicle purchase or lease is a substantial transaction. Do not execute any sale or lease document if it is not fully completed or does not accurately reflect your agreement with the motor vehicle dealer. If you suffer any damages as a result of improper actions of the motor vehicle dealer, relief may be available to you under the laws of this state including part VI of chapter 501, Florida Statutes.

The important aspects of the pre-suit notice process are detailed below for both individual and class action claims.

Individual

At least 30 days before a potential plaintiff may sue for a FDUTPA violation, the plaintiff must provide an alleged dealer written notice of the plaintiff's intent to initiate litigation. This good faith written notice by the plaintiff must:

- Indicate that it is a demand pursuant to the new provisions of this bill;
- State the name, address, telephone number of the plaintiff and the name and address of the dealer;
- Specifically describe the alleged violation;
- Be accompanied by a copy of all documents upon which the claim is based;
- Describe and provide the amount of each item of actual damages demanded by the plaintiff and recoverable under FDUTPA (if the plaintiff cannot in good faith quantify any item of actual damage as required, the claimant must provide a comprehensive description of the item of damage or a formula or basis by which the dealer may calculate the damage); and
- Include a description of reasonable attorney's fees incurred, if any, for which reimbursement, not to exceed $500, is sought.

The notice must be sent by certified mail, return receipt requested, to the dealer. If the dealer is a corporate entity, the notice must be sent to the business's registered agent on file with the Secretary of State. In the absence of such an agent, the notice can be sent to individuals within the corporation authorized by statute to receive service of process.

[6] It should be noted, however, that these conditions do not apply to actions brought by a State Attorney or the Department of Legal Affairs (the enforcing authorities).

If the dealer pays the claim in the notice, within 30 days, together with a surcharge of 10 percent of the amount requested in the demand letter (not to exceed $500), and attorney's fees of the plaintiff (not to exceed $500), then the plaintiff may not initiate litigation against the dealer under this section.

However, this protection does not apply if the notice of claim specifies nonquantified items of damage. In such a case, the dealer may notify the plaintiff in writing within 30 days after receiving the notice that the dealer proposes to pay the claim with modifications. The dealer must inform the claimant that he or she has placed a value on the nonquantified items of damage and intends to pay that amount plus the surcharge and the attorney's fees. The plaintiff must accept or reject, in writing, the offer of the dealer within 10 business days. If a plaintiff accepts, the dealer must pay the plaintiff the amount set forth in the proposal within 10 business days. If that is done, a plaintiff may not initiate litigation against the dealer for a claim described in the notice of claim unless the dealer ignores, rejects, or fails to timely respond to the claimant's demand, or fails to pay within 10 business days the amount accepted by claimant; or the claimant does not accept the proposal of the dealer.

If the event the notice includes damages that arise from the plaintiff's lack of access to a motor vehicle due to the conduct of the dealer, the dealer has only 10 business days to respond, not 30 days.

A payment by the dealer will be treated as being made on the date a draft or other valid instrument equivalent to payment is placed in the U.S. mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery. The plaintiff is not entitled to a surcharge in any proceeding initiated against a dealer under this part if the dealer rejects or ignores the notice of claim or the plaintiff rejects or ignores the dealer's proposal.

A dealer can avoid paying attorney's fees in a subsequent action if the dealer, within 30 days after receiving the notice, notifies the plaintiff in writing that the amount claimed is not supported by the facts of the transaction or by generally accepted accounting principles, or includes improper damages recoverable, but, the dealer, offers to pay to the actual damages supported by the facts described in the notice; the plaintiff's basis for rejecting or ignoring the dealer's proposal is not supported by the facts described in the notice of claim, generally accepted accounting principles, or the law; or the claimant fails to substantially comply with this section. This provision only offers the dealer protection if a court or arbitrator in a later action agrees. A dealer is not required to pay attorney's fees for a plaintiff who fails to comply with the notice requirements.

Where a dealer offers to or pays a plaintiff's actual damages, that action will not constitute an admission of any wrongdoing and is not admissible to prove the dealer's liability or absence of liability. Moreover, such an offer or payment releases the dealer from any further liability under FDUTPA arising out of the event described in the notice. The payment of or offer to pay damages can serve as a defense in any action for damages not brought under FDUTPA against the dealer arising out of the event described in the notice. The payment may also serve as a defense in any subsequent action brought by any member of the class who did not opt out in connection with the class action notice if the action was settled on a class-wide basis.

Class Action

Class actions are similar, although the 10% surcharge is not available, and the applicable time periods are 45 days rather than 30 days. In addition to describing a plaintiff's individual claim, a class action notice must include the definition of the class of plaintiffs; a description of the alleged violations under FDUTPA to the class; and a statement describing and providing the amount of each item of actual damages demanded on behalf of the class.

Should the dealer agree to pay the actual class damages, the dealer must notify the plaintiff of that decision in writing within 90 days. Within 90 days after receipt of the dealer's notice, the plaintiff must file an action to enforce the agreement in court. It is then the court's responsibility to determine the fairness of the agreement to the class, to administer the agreed upon resolution of the class claim, to carry out the notification and the opt-out processes, and to award reasonable attorney's fees to the

plaintiff's counsel only for actual time spent in connection with this proceeding. If the plaintiff fails to timely file this action or if the court determines that the agreement is not fair, both the notice and the dealer's response will be deemed void.

The dealer is not obligated to pay attorney's fees if, within 45 days, the dealer informs that the plaintiff is seeking to recover improper damages or is seeking excessive actual damages, but offers to pay the class all properly recoverable damages listed in the notice; or that the claim is not a valid, properly certified class claim, but still offers to pay the plaintiff individually all properly recoverable actual damages listed in the notice, plus the surcharge and attorney's fees. This provision only protects the dealer if a court or arbitrator in a later action agrees.

C. SECTION DIRECTORY:

Section 1 amends the definition of "replacement item" in s. 501.975, F.S.

Section 2 creates s. 501.9755, F.S., describing unlawful acts and practices by a motor vehicle dealer taken from 501.204, F.S.

Section 3 amends s. 501.976, F.S., by including unlawful acts and practices under s. 501.9755, F.S. and exempting from the acts failure to sign all contracts under certain circumstances.

Section 4 creates s. 501.9765, F.S., describing violations against senior citizens and handicapped persons, taken from s. 501.2077, F.S.

Section 5 creates s. 501.977, F.S., regarding other individual remedies, taken from s. 501.211, F.S.

Section 6 creates s. 501.978, F.S., providing that remedies are supplemental to other laws, taken from 501.213, F.S.

Section 7 creates s. 501.979, F.S., regarding the award of attorney's fees to a prevailing party, taken from s. 501.2105, F.S.

Section 8 creates s. 501.980, F.S. describing the demand letter provisions.

Section 9 amends s. 501.212, F.S to create subsection (8) exempting actions brought by a person other than the enforcing authority.

Section 10 provides this bill is effective upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

There will be a minimal nonrecurring fiscal cost to the Department of Legal Affairs in FY 2006-2007 related to rulemaking regarding a sample notice for the public's use.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

This bill creates rulemaking authority in the Department of Legal Affairs for the purpose of developing a sample claim form.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Lines 504-507 provide that if a court determines that class action notice agreement is not fair or if a claimant fails to timely file the notice, then both the notice and the violator's response are deemed void. In such a circumstance it is unclear if the potential class will need to file a second notice with the dealer and begin the process anew or if the action may simply continue with the court.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 15, 2006, the Civil Justice Committee adopted one strike all amendment to the bill which primarily limited the FDUTPA pre-suit requirements to actions involving motor vehicle dealers. Additionally, the amendment changed the following:

- Provided for a statutory consumer notice informing a buyer of the significance of signing a contract to purchase a motor vehicle and potential legal remedies for unfair or deceptive acts on the part of the dealer.

- Simplified ch. 501, F.S. by transferring all provisions relating to motor vehicles to Part VI, of ch. 501, F.S. For instance, section 2 reproduces s. 501.204, F.S., section 4 reproduces s. 501.2077, F.S., section 5 largely a reproduces s. 501.211, F.S., section 6 reproduces of s. 501.213, F.S., and section 7 is essentially the same as s. 501.2105, F.S.

The bill was then reported favorably with a committee substitute.

CHAMBER ACTION

The Civil Justice Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to deceptive and unfair trade practices; amending s. 501.975, F.S.; providing definitions for part VI of ch. 501, F.S.; creating s. 501.9755, F.S.; declaring that unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices used by motor vehicle dealers are unlawful; providing legislative intent; amending s. 501.976, F.S.; providing an exception to the requirement that a contract be fully complete before a customer signs a motor vehicle dealer's contract; providing a required contractual notice; deleting a provision regarding award of attorney's fees; creating s. 501.9765, F.S.; providing definitions; providing that a motor vehicle dealer who willfully uses a method or practice that victimizes or attempts to victimize senior citizens or handicapped persons commits an unfair or deceptive trade practice; providing a civil penalty; providing for reimbursement or restitution; creating s. 501.977, F.S.; providing additional remedies

against a motor vehicle dealer; creating s. 501.978, F.S.; providing that the remedies of part VI of ch. 501, F.S., are in addition to remedies otherwise available for the same conduct under state or local law and do not preempt local consumer-protection ordinances not in conflict with part VI of ch. 501, F.S.; creating s. 501.979, F.S.; providing for attorney's fees for a prevailing party; providing procedures for receiving attorney's fees; authorizing the Department of Legal Affairs or the office of the state attorney to receive attorney's fees under certain circumstances; creating s. 501.980, F.S.; requiring that, as a condition precedent to initiating civil litigation arising under part VI of ch. 501, F.S., a claimant give the motor vehicle dealer written notice of the claimant's intent to initiate litigation against the motor vehicle dealer not less than 30 days before initiating the litigation; providing for the content of the notice of claim and the method by which the notice of claim is given to the motor vehicle dealer; providing that if the claim is paid by the motor vehicle dealer within 30 days after receiving the notice of claim, together with a surcharge of 10 percent of the alleged actual damages, the claimant may not initiate litigation against the motor vehicle dealer, and the motor vehicle dealer is obligated to pay only $500 for the attorney's fees of the claimant; providing that the surcharge not exceed $500; providing procedures for damage claims that are nonquantifiable; providing expedited procedures when the claimant is

without access to a motor vehicle; providing that a claimant is not entitled to a surcharge under certain circumstances; providing that a motor vehicle dealer is not obligated to pay the claimant's attorney's fees under certain circumstances; providing that the presuit-notification procedures apply to class actions; providing that any applicable statute of limitations is tolled for 30 days for individual claims and 90 days for class action claims; providing that the act does not affect the statutory responsibilities of the Attorney General or the office of the state attorney; requiring the Department of Legal Affairs to prepare a specified sample demand letter and make it available to the public; requiring a court to abate litigation, without prejudice, until the claimant has complied with the required procedures; amending s. 501.212, F.S.; exempting motor vehicle dealers from the provisions of part II of ch. 501, F.S.; providing an exception for the enforcing authority; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 501.975, Florida Statutes, is amended to read:

501.975 Definitions.--As used in <u>this part</u> ~~s. 501.976~~, the <u>term</u> ~~following terms shall have the following meanings~~:

(1) "Customer" includes a customer's designated agent.

(2) "Dealer" means a motor vehicle dealer as defined in s. 320.27, but does not include a motor vehicle auction as defined in s. 320.27(1)(c)4.

(3) "Replacement item" means a tire, bumper, bumper fascia, glass, in-dashboard equipment, seat or upholstery cover or trim, exterior illumination unit, grill, sunroof, external mirror and external body cladding. The replacement of up to three of these items does not constitute repair of damage if each item is replaced because of a product defect or damage ~~damaged~~ due to vandalism, lot damage, or an act of God while the new motor vehicle is under the control of the dealer and the items are replaced with original manufacturer equipment~~, unless an item is replaced due to a crash, collision, or accident~~.

(4) "Threshold amount" means 3 percent of the manufacturer's suggested retail price of a motor vehicle or $650, whichever is less.

(5) "Vehicle" means any automobile, truck, bus, recreational vehicle, or motorcycle required to be licensed under chapter 320 for operation over the roads of Florida, but does not include trailers, mobile homes, travel trailers, or trailer coaches without independent motive power.

Section 2. Section 501.9755, Florida Statutes, is created to read:

501.9755 Unlawful acts and practices.--

(1) Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce by a dealer are unlawful.

(2) It is the intent of the Legislature that, in construing subsection (1), due consideration and great weight be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. s. 45(a)(1).

Section 3. Section 501.976, Florida Statutes, is amended to read:

501.976 Actionable, unfair, or deceptive acts or practices.--In addition to acts and practices actionable under s. 501.9755, it is an unfair or deceptive act or practice, actionable under the Florida Deceptive and Unfair Trade Practices Act, for a dealer to:

(1) Represent directly or indirectly that a motor vehicle is a factory executive vehicle or executive vehicle unless the ~~such~~ vehicle was purchased directly from the manufacturer or a subsidiary of the manufacturer and the vehicle was used exclusively by the manufacturer, its subsidiary, or a dealer for the commercial or personal use of the manufacturer's, subsidiary's, or dealer's employees.

(2) Represent directly or indirectly that a vehicle is a demonstrator unless the vehicle complies with the definition of a demonstrator in s. 320.60(3).

(3) Represent the previous usage or status of a vehicle to be something that it was not, or make usage or status representations unless the dealer has correct information regarding the history of the vehicle to support the representations.

(4) Represent the quality of care, regularity of servicing, or general condition of a vehicle unless known by the dealer to be true and supportable by material fact.

(5) Represent orally or in writing that a particular vehicle has not sustained structural or substantial skin damage unless the statement is made in good faith and the vehicle has been inspected by the dealer or his or her agent to determine whether the vehicle has incurred such damage.

(6) Sell a vehicle without fully and conspicuously disclosing in writing at or before the consummation of sale any warranty or guarantee terms, obligations, or conditions that the dealer or manufacturer has given to the buyer. If the warranty obligations are to be shared by the dealer and the buyer, the method of determining the percentage of repair costs to be assumed by each party must be disclosed. If the dealer intends to disclaim or limit any expressed or implied warranty, the disclaimer must be in writing in a conspicuous manner and in lay terms in accordance with chapter 672 and the Magnuson-Moss Warranty--Federal Trade Commission Improvement Act.

(7) Provide an express or implied warranty and fail to honor such warranty unless properly disclaimed pursuant to subsection (6).

(8) Misrepresent warranty coverage, application period, or any warranty transfer cost or conditions to a customer.

(9) Obtain signatures from a customer on contracts that are not fully completed <u>as to all material terms</u> at the time the customer signs or which do not reflect accurately the negotiations and agreement between the customer and the dealer.

However, this subsection does not apply if, at the time of the transaction, the customer acknowledges in writing, separate from any other text, having read substantially the following notice:

STATUTORY CONSUMER NOTICE: A vehicle purchase or lease is a substantial transaction. Do not execute any sale or lease document if it is not fully completed or does not accurately reflect your agreement with the motor vehicle dealer. If you suffer any damages as a result of improper actions of the motor vehicle dealer, relief may be available to you under the laws of this state, including part VI of chapter 501, Florida Statutes.

(10) Require or accept a deposit from a prospective customer prior to entering into a binding contract for the purchase and sale of a vehicle unless the customer is given a written receipt that states how long the dealer will hold the vehicle from other sale and the amount of the deposit, and clearly and conspicuously states whether and upon what conditions the deposit is refundable or nonrefundable.

(11) Add to the cash price of a vehicle as defined in s. 520.02(2) any fee or charge other than those provided in that section and in rule 3D-50.001, Florida Administrative Code. All fees or charges permitted to be added to the cash price by rule 3D-50.001, Florida Administrative Code, must be fully disclosed to customers in all binding contracts concerning the vehicle's selling price.

(12) Alter or change the odometer mileage of a vehicle except in compliance with 49 U.S.C. s. 32704.

(13) Sell a vehicle without disclosing to the customer the actual year and model of the vehicle.

(14) File a lien against a new vehicle purchased with a check unless the dealer fully discloses to the purchaser that a lien will be filed if purchase is made by check and fully discloses to the buyer the procedures and cost to the buyer for gaining title to the vehicle after the lien is filed.

(15) Increase the price of the vehicle after having accepted an order of purchase or a contract from a buyer, notwithstanding subsequent receipt of an official price change notification. The price of a vehicle may be increased after a dealer accepts an order of purchase or a contract from a buyer if:

(a) A trade-in vehicle is reappraised because it subsequently is damaged, or parts or accessories are removed;

(b) The price increase is caused by the addition of new equipment, as required by state or federal law;

(c) The price increase is caused by the revaluation of the United States dollar by the Federal Government, in the case of a foreign-made vehicle;

(d) The price increase is caused by state or federal tax rate changes; or

(e) Price protection is not provided by the manufacturer, importer, or distributor.

(16) Advertise the price of a vehicle unless the vehicle is identified by year, make, model, and a commonly accepted trade, brand, or style name. The advertised price must include all fees or charges that the customer must pay, including

freight or destination charge, dealer preparation charge, and charges for undercoating or rustproofing. State and local taxes, tags, registration fees, and title fees, unless otherwise required by local law or standard, need not be disclosed in the advertisement. When two or more dealers advertise jointly, with or without participation of the franchisor, the advertised price need not include fees and charges that are variable among the individual dealers cooperating in the advertisement, but the nature of all charges that are not included in the advertised price must be disclosed in the advertisement.

(17) Charge a customer for any predelivery service required by the manufacturer, distributor, or importer for which the dealer is reimbursed by the manufacturer, distributor, or importer.

(18) Charge a customer for any predelivery service without having printed on all documents that include a line item for predelivery service the following disclosure: "This charge represents costs and profit to the dealer for items such as inspecting, cleaning, and adjusting vehicles, and preparing documents related to the sale."

(19) Fail to disclose damage to a new motor vehicle, as defined in s. 319.001(8), of which the dealer had actual knowledge, if the dealer's actual cost of repairs exceeds the threshold amount, excluding replacement items.

~~In any civil litigation resulting from a violation of this section, when evaluating the reasonableness of an award of attorney's fees to a private person, the trial court shall~~

~~consider the amount of actual damages in relation to the time spent.~~

Section 4. Section 501.9765, Florida Statutes, is created to read:

501.9765 Violations involving a senior citizen or handicapped person; civil penalties; presumption.--

(1) As used in this section, the term:

(a) "Senior citizen" means a person who is 60 years of age or older.

(b) "Handicapped person" means any person who has a mental or educational impairment that substantially limits one or more major life activities.

(c) "Mental or educational impairment" means:

1. Any mental or psychological disorder or specific learning disability.

2. Any educational deficiency that substantially affects a person's ability to read and comprehend the terms of any contractual agreement entered into.

(d) "Major life activities" means functions associated with the normal activities of independent daily living such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(2) Any person who willfully uses, or has willfully used, a method, act, or practice in violation of this part, which method, act, or practice victimizes or attempts to victimize a senior citizen or handicapped person, and commits such violation when he or she knew or should have known that his or her conduct

was unfair or deceptive, is liable for a civil penalty of not more than $15,000 for each such violation.

(3) Any order of restitution or reimbursement based on a violation of this part committed against a senior citizen or handicapped person has priority over the imposition of civil penalties for violations of this section.

(4) Civil penalties collected under this section shall be deposited into the Legal Affairs Revolving Trust Fund of the Department of Legal Affairs and allocated to the Department of Legal Affairs solely for the purpose of preparing and distributing consumer-education materials, programs, and seminars to benefit senior citizens and handicapped persons or to enhance efforts to enforce this section.

Section 5. Section 501.977, Florida Statutes, is created to read:

501.977 Other individual remedies.--

(1) Without regard to any other remedy or relief to which a person is entitled, anyone aggrieved by a violation of this part by a dealer may bring an action against the dealer in order to obtain a declaratory judgment that an act or practice violates this part and to enjoin a dealer who has violated, is violating, or is otherwise likely to violate, this part.

(2) In any action brought by a person who has suffered a loss as a result of a violation of this part, the person may recover actual damages, plus attorney's fees and court costs as provided in s. 501.979. However, damages, fees, or costs are not recoverable under this section against a dealer who has, in good faith, engaged in the dissemination of claims of a manufacturer,

distributor, importer, or wholesaler without actual knowledge that doing so violates this part.

(3) In any action brought under this section, if, after the filing of a motion by the dealer, the court finds that the action is frivolous, without legal or factual merit, or brought for the purpose of harassment, the court may, after hearing evidence as to the necessity therefor, require the party instituting the action to post a bond in the amount that the court finds reasonable to indemnify the defendant for any costs incurred, or to be incurred, including reasonable attorney's fees in defending the claim. This subsection does not apply to any action initiated by the enforcing authority.

Section 6. Section 501.978, Florida Statutes, is created to read:

501.978 Effect on other remedies.--

(1) The remedies of this part are in addition to remedies otherwise available for the same conduct under state or local law.

(2) This part is supplemental to, and does not preempt, local consumer-protection ordinances not inconsistent with this part.

Section 7. Section 501.979, Florida Statutes, is created to read:

501.979 Attorney's fees.--

(1) In any civil litigation resulting from an act or practice involving a violation of this part, except as provided in subsection (5) and s. 501.980, the prevailing party, after judgment in the trial court and exhaustion of all appeals, if

any, shall receive his or her reasonable attorney's fees and costs from the nonprevailing party. When evaluating the reasonableness of an award of attorney's fees to a private person, the trial court shall consider the actual damages in relation to the time spent.

(2) The attorney for the prevailing party shall submit a sworn affidavit of his or her time spent on the case and his or her costs incurred for all the motions, hearings, and appeals to the trial judge who presided over the civil case.

(3) The trial judge may award the prevailing party the sum of reasonable costs incurred in the action, plus reasonable attorney's fees for the hours actually spent on the case as sworn to in an affidavit.

(4) Any award of attorney's fees or costs becomes a part of the judgment and is subject to execution as the law allows.

(5) In any civil litigation initiated by the enforcing authority, the court may award to the prevailing party reasonable attorney's fees and costs if the court finds that there was a complete absence of a justiciable issue of law or fact raised by the losing party or if the court finds bad faith on the part of the losing party.

(6) In any administrative proceeding or other nonjudicial action initiated by an enforcing authority, the attorney for the enforcing authority may certify by sworn affidavit the number of hours and the cost thereof to the enforcing authority for the time spent in the investigation and litigation of the case, plus costs reasonably incurred in the action. Payment to the enforcing authority of the sum of the costs may, by stipulation

of the parties, be made a part of the final order or decree disposing of the matter. The affidavit shall be attached to and become a part of the order or decree.

Section 8. Section 501.980, Florida Statutes, is created to read:

501.980 Demand letter.--

(1) As a condition precedent to initiating any civil litigation arising under this part, a claimant must give the dealer written notice of the claimant's intent to initiate litigation against the dealer not less than 30 days before initiating the litigation.

(2) The notice, which must be completed in good faith, must:

(a) State that it is a demand letter under s. 501.980;

(b) State the name, address, and telephone number of the claimant;

(c) State the name and address of the dealer;

(d) Provide the date and a description of the transaction, event, or circumstance that is the basis of the claim;

(e) Describe with specificity the underlying facts and how they give rise to an alleged violation of this part;

(f) To the extent applicable, be accompanied by all transaction or other documents upon which the claim is based or upon which the claimant is relying to assert the claim;

(g) Include a statement describing and providing the amount of each item of actual damages demanded by the claimant and recoverable under this part. However, to the extent the claimant cannot in good faith quantify any item of actual damage

as required, the claimant shall provide a comprehensive description of the item of damage or a formula or basis by which the dealer may calculate the damage; and

(h) Include a description of reasonable attorney's fees incurred, if any, for which reimbursement, not to exceed $500, is sought.

(3)(a) The notice of the claim must be delivered to the dealer by certified mail, return receipt requested. The postal costs shall be reimbursed to the claimant by the dealer if the dealer pays the claim and if the claimant requests reimbursement of the postal costs in the notice of claim.

(b) If the dealer is a corporate entity, the notice of claim must be sent to the registered agent of the dealer as recorded with the Department of State and, in the absence of a registered agent, any person listed in s. 48.081(1).

(4) Notwithstanding any provision of this part to the contrary, a claimant may not initiate litigation against a dealer for a claim arising under this part related to, or in connection with, the transaction or event described in the notice of claim if the dealer pays the claimant within 30 days after receiving the notice of claim:

(a) The amount requested in the demand letter as specified in paragraph (2)(g);

(b) A surcharge of 10 percent of the amount requested in the demand letter, not to exceed $500; and

(c) The attorney's fees of the claimant as specified in paragraph (2)(h), not to exceed $500.

(5)(a) Subsection (4) does not apply if the notice of claim specifies nonquantified items of damage. However, the dealer may notify the claimant in writing within 30 days after receiving the notice of claim that the dealer proposes to pay the claim with modifications. The dealer must inform the claimant that he or she has placed a value on the nonquantified items of damage and intends to pay that amount in addition to the payments described in paragraphs (4)(a) and (b).

(b) The claimant must accept or reject, in writing, the offer of the dealer within 10 business days after receiving the offer.

(c) Upon receipt of the notice of acceptance, the dealer must pay the claimant the amount set forth in the proposal within 10 business days after receiving the notice of acceptance.

(d) A claimant may not initiate litigation against the dealer for a claim under this part that is related to, or in connection with, the transaction or event described in the notice of claim unless:

1. The dealer ignores, rejects, or fails to timely respond to the claimant's demand, or fails to pay within 10 business days the amount accepted by claimant; or

2. The claimant does not accept the proposal of the dealer.

(6) If the notice of claim includes damages that arise from the claimant's not having access to a motor vehicle due to the alleged conduct of the dealer, the time set forth in

subsections (4) and (5) for the dealer to respond are reduced from 30 days to 10 business days.

(7) For the purpose of this section, payment by a dealer is deemed paid on the date a draft or other valid instrument that is equivalent to payment is placed in the United States mail, or other nationally recognized carrier, in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.

(8) The claimant is not entitled to a surcharge in any proceeding initiated against a dealer under this part if the dealer rejects or ignores the notice of claim or the claimant rejects or ignores the dealer's proposal described in subsection (5).

(9) Notwithstanding any provision of this part to the contrary, a dealer is not required to pay the attorney's fees of the claimant in any civil action brought under this part if:

(a) The dealer, within 30 days after receiving the claimant's notice of claim, notifies the claimant in writing, and a court or arbitrator agrees, that the amount claimed is not supported by the facts of the transaction or event described in the notice of claim or by generally accepted accounting principles, or includes items not properly recoverable under this part, but nevertheless offers to pay to the claimant the actual damages that are supported by the facts of the transaction or event described in the notice of claim and properly recoverable under this part, and the surcharge and attorney's fees, if any, described in subsection (4);

(b) The claimant's basis for rejecting or ignoring the dealer's proposal described in subsection (5) is not supported by the facts described in the notice of claim, generally accepted accounting principles, or the law; or

(c) The claimant fails to substantially comply with this section.

(10) This section shall apply to class action claims, subject to the following conditions:

(a) In addition to describing the claimant's individual claim as required by subsection (2), the class action notice of claim to the dealer must also include:

1. The definition of the class of claimants for whom relief is sought;

2. A description of the alleged violations of this part that have allegedly damaged the class; and

3. A statement describing and providing the amount of each item of actual damages demanded by the claimant on behalf of the class under this part or, if the claimant cannot in good faith quantify an item of actual damages, a comprehensive description of the item of damages and a formula or basis by which the dealer may calculate the damages.

(b) The surcharge set forth in subsection (4) shall not apply.

(c) All time periods described in other subsections of this section shall be 45 days in length for class actions unless further extended by a written agreement of the parties.

(d) If the dealer agrees to pay the damages demanded in the class action notice of claim, the dealer must notify the

claimant of the decision in writing within 90 days after receiving the class action notice of claim. Within 90 days after receiving the dealer's notice of agreement, the claimant, on behalf of the class, must file a civil action to enforce the agreement, the purpose of which is to conduct proceedings to determine the fairness of the agreement to the class, to administer the agreed resolution of the class action, to provide for notification and opt-out procedures applicable in a class action, to ensure compliance with the rules of civil procedure, and to award reasonable attorney's fees to the claimant's counsel for actual time spent in connection with the proceeding. If the claimant fails to timely file the civil action within 90 days or if the court determines that the agreement is not fair to the class, the class action notice and the dealer's response are void.

(e) A dealer is not be obligated to pay attorney's fees for the claimant in a class action proceeding if the dealer, within 45 days after receiving the class action notification, informs the claimant in writing, and a court or arbitrator in a subsequent action agrees, that:

1. The claimant is seeking to recover damages for the class that are not properly recoverable under this part or is seeking to recover damages that are not supported by the facts of the transaction or event described in the class action notice of claim or by generally accepted accounting principles, but still offers to pay the class all damages properly recoverable and listed in the notice of claim; or

2. The claim or class is not a valid class claim or the class is not properly certified as a class, but the dealer still offers to pay all actual damages properly recoverable by the claimant under this part as an individual that are supported by the facts of the transaction or event described in the class action notice of claim, in addition to the payments described in paragraphs (4)(b) and (c).

(11) Payment of the actual damages or an offer to pay actual damages as set forth in this section:

(a) Does not constitute an admission of any wrongdoing by the dealer;

(b) Is protected by s. 90.408;

(c) Serves to release the dealer from any suit, action, or other action that could be brought under this part arising out of or in connection with the transaction, event, or occurrence described in the notice of claim;

(d) Serves as a defense in any action brought by the same claimant to the extent of the damages, inclusive of any surcharge, paid by the dealer; and

(e) Serves as a defense in any subsequent action brought by any member of the class who did not opt out in connection with the same set of operative facts as described in the class action notice of claim if the action was settled on a classwide basis.

(12) The applicable statute of limitations period for an action under this part is tolled for 30 days for individual claims and 45 days for class action claims, or such other period

of time as agreed to by the parties in writing, by the mailing of the notice required by this section.

(13) This section does not apply to actions brought by the enforcing authority. Notwithstanding the foregoing, the Department of Legal Affairs shall prepare a sample demand letter to incorporate the information required by subsection (2) for individual notice of claims and shall make it available to the public.

(14) If a claimant initiates civil litigation under this part without first complying with the requirements of this section, the court, upon a motion of a dealer, shall abate the litigation, without prejudice, until the claimant has complied with the provisions of this part.

Section 9. Subsection (8) is added to section 501.212, Florida Statutes, to read:

501.212 Application.--This part does not apply to:

(8) A claim brought by a person other than the enforcing authority against a dealer as defined in s. 501.975(2).

Section 10. This act shall take effect upon becoming a law.

HB 839 CS
Kottkamp

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 839 CS Homeowners' Associations
SPONSOR(S): Kottkamp; Baxley; Davis, D.; Ross; Zapata
TIED BILLS: None **IDEN./SIM. BILLS:** SB 2358

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	5 Y, 0 N, w/CS	Blalock	Bond
2) Judiciary Committee	12 Y, 0 N, w/CS	Thomas	Hogge
3) Economic Development, Trade & Banking Committee		Olmedillo	Carlson
4) Justice Council			
5)			

SUMMARY ANALYSIS

A homeowners' association is a corporation responsible for the operation of a community in which voting membership is made up of parcel ownership and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel.

The bill requires that the annual association budget must be paid for by the association and that the budget may include reserve accounts for capital expenditures and deferred maintenance. The bill increases from 60 to 90 days the time that an association has to prepare and complete an annual financial report after the close of the fiscal year.

The bill creates provisions relating to architectural control covenants and parcel owner improvements. The bill requires additional documents the developer must provide to the board of directors for associations incorporated after December 31, 2006. Finally, the bill provides for guarantees of assessments if a guarantee is not included in the purchase contract or declaration.

The bill takes effect on July 1, 2006.

The bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Limited Government: This bill increases regulation of homeowners' associations.

Safeguard Individual Liberty: This bill increases the power of parcel owners in making improvements under architectural control covenants.

B. EFFECT OF PROPOSED CHANGES:

Background

A homeowners' association is an entity responsible for the operation of a community or mobile home subdivision in which voting membership is made up of parcel ownership and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel.[1] Homeowners' associations are regulated under ch. 720, F.S.

The purposes of the statutory provisions relating to homeowners' associations are to give statutory recognition to corporations that operate residential communities in Florida, to provide procedures for operating a homeowners' association, and to protect the rights of association members without unduly impairing the ability of the association to perform its functions.[2]

Homeowners' associations were first regulated by statute in 1992 when laws regarding homeowners' associations were placed in ch. 617, F.S., which chapter regulates not for profit corporations.[3] By placing the regulation in a chapter that regulates corporations, the implication was that a homeowners' association must be incorporated; however, this was not specifically required. In 1995, the regulation was amended to specifically require that an association be incorporated, and that the initial governing documents of the association be recorded in the public records.[4] In 2000, the regulation of homeowners' associations was moved out of the chapter on not for profit corporations, and into its own chapter, ch. 720, F.S.

Section 720.303, F.S., regulates several aspects of a homeowners' association including the powers and duties of the association, the association budget, and financial reporting requirements.

Currently, s. 720.303(1), F.S., provides that a homeowners' association must be operated by an association that is a Florida corporation, and provide that after October 1, 1995, the association must be incorporated and the initial governing documents of an association must be recorded in the official records of the county in which the community is located.[5] "Governing documents" means the recorded declaration of covenants for a community and all duly adopted and recorded amendments, supplements, and recorded exhibits,[6] the articles of incorporation and bylaws of the homeowners' association and any adopted amendments.[7] It appears that associations created before October 1, 1995 are grandfathered in and thus are not required to be incorporated in Florida and are not required

[1] Section 720.301(9), F.S.
[2] Section 720.302(1), F.S.
[3] See sections 33 through 39 of ch. 92-49, L.O.F.
[4] See section 54 of ch. 95-274, L.O.F.
[5] Section 720.303(1), F.S.
[6] Section 720.303(6)(a), F.S.
[7] Section 720.303(6)(b), F.S.

to record their governing documents in the public records. Section 720.303(1), F.S., also provides that an association may operate more than one community.

Effect of Bill

Homeowners' Association Budgets

Section 720.303(6), F.S., provides that an association must prepare an annual budget.

Proposed Change:

This bill amends s. 720.303(6), F.S., to require that:

- The annual budget provide for the annual operating expenses and the budget must set out all fees or charges paid for by the association.
- The annual budget may include reserve accounts for capital expenditures and deferred maintenance for which the association is responsible to the extent that the association's governing documents do not limit increases in assessments.
- If the budget of the association does not provide for reserve accounts and the association is responsible for the repair and maintenance of capital improvements that may result in special assessments if reserves are not provided, each financial report for the preceding fiscal year must contain a statement in conspicuous type as provided by the bill.
- An association is deemed to have provided for reserve accounts when reserve accounts have been initially established by the developer or when the membership of the association affirmatively elects to provide for reserves. Once established, the reserve accounts must be funded, maintained or waived.
- The amount to be reserved must be computed by using a formula that is based upon estimated remaining useful life and estimated replacement cost or deferred maintenance expense of each reserve item.
- Once a reserve account or reserve accounts are established, the membership of the association may provide for no reserves or less reserves.
- After the turnover, a developer may vote its voting interest to waive or reduce the funding of reserves.
- Reserve funds and any interest shall remain in the reserve account, and may be used only for authorized reserve expenditures.
- Prior to turnover of control of an association by a developer to parcel owners, the developer-controlled association may not vote to use reserves for purposes other than that for which they were intended without the approval of a majority of all non-developer voting interests.

Homeowners' Association Financial Reporting

Section 720.303(7), F.S., requires homeowners' associations to prepare an annual financial report within 60 days after the close of the fiscal year. The association must provide each member with a copy of the annual financial report or a written notice that a copy of the financial report is available upon request at no charge to the member.

Proposed Changes:

This bill amends s. 720.303(7), F.S., to increase from 60 to 90 days the time that an association has to prepare and complete an annual financial report after the close of the fiscal year. Within 21 days after the final financial report is completed by the association, but no later than 120 days after the end of the fiscal year, the association must provide each member with a copy of the annual financial report. Homeowners' associations and condominium associations are generally operated and managed the same way, and the language used in this bill is identical in form to language contained in s. 718.111(13), F.S., regarding financial reporting for condominium associations.

This bill amends s. 720.303(7)(a), F.S., to provide that financial statements are to be completed in accordance with the accounting principles adopted by the Florida Board of Accountancy.

Architectural Control Covenants; Parcel Owner Improvements; Rights and Privileges

Proposed Changes:

This bill creates s. 720.3035, F.S., to provide that:

- An association may review and approve plans and specifications for the location, size, type or appearance of any structure, or enforce such standards, only to the extent as specifically stated or reasonably inferred in the declaration of covenants.
- An association may only restrict the right of a parcel owner to select from options for the use of material, the size or design of the structure or improvement, or the location of the structure or improvement on the parcel, as provided in the declaration of covenants.
- For the purpose of establishing setback lines specifically stated in the declaration of covenants, each parcel may be deemed to have only one front. When the declaration of covenants does not provide for specific setback lines, the applicable county or municipal setback lines shall apply.
- Each parcel owner is entitled to the rights and privileges provided in the declaration of covenants concerning the use of the parcel, and the construction of permitted structures and improvements on the parcel and such rights and privileges shall not be unreasonably impaired by the association.
- An association may not enforce any policy that is inconsistent with the rights and privileges of a parcel owner set forth in the declaration of covenants, whether the policy is uniformly applied or not.

Transition of Homeowners' Association Control

Section 720.307, F.S., provides procedures for turning over control of an association from the developer to parcel owners. The transition of association control begins with the election of the board of directors of the homeowners' association by the members. At the time the members elect a majority of the board of directors, the developer must deliver various documents to the board.

Proposed Changes:

This bill amends s. 720.307, F.S., to include additional documents the developer must provide to the board of directors. Along with the documents that must be provided by the developer under current law, this bill requires that the developer also provide the board of directors the financial records, including the statements of the association, and source documents from the incorporation of the association through the date of turnover. This bill also provides that an independent certified public accountant must audit the records and determine that the developer was charged with, and paid, the proper amounts of assessments.

The language in this section of the bill is taken from language found in s. 718.301(4)(c), F.S., of the Condominium Act. The current law for homeowners' associations pertaining to transition of association control is very similar to the current condominium act and this bill provides conformity between the homeowners' associations and the condominium associations.

The provisions added by this section of the bill apply only to associations incorporated after December 31, 2006.

Guarantees of Common Expenses

The developer of a community is responsible for paying the costs of the common expenses of the community until the sale of the parcels to a purchaser in which time the developer pays a proportionate share of the common expenses with the parcel owners. Condominium law allows a developer to be excused from payment of common expenses if the common expenses of all unit owners are guaranteed not to increase and the developer agrees to pay all common expenses incurred but not covered by unit owner payments during the period of the guarantee.[8]

Proposed Changes:

This bill amends s. 720.308, F.S., to provide for the guarantee of assessments if a guarantee is not included in the purchase contract or declaration. This bill provides that a guarantee is effective only upon approval of a majority of the voting interests of the members other than the developer. This bill also provides that:

- The time period of a guarantee must have a specific beginning and ending date or event;
- The dollar amount of the guarantee must be an exact dollar amount for each parcel identified in the declaration;
- The cash payments required from the developer must be paid when the revenue collected by the association is not sufficient to provide payment for all assessments; and,
- The expenses incurred in the production of non-assessment revenues, not in excess of the non-assessment revenues, must not be included in the assessments. If expenses attributable to non-assessment revenues exceed non-assessment revenues, then the guarantor must only fund the excess expenses.

C. SECTION DIRECTORY:

Section 1 amends s. 720.303, F.S., relating to association powers and duties.

Section 2 creates s. 720.3035, F.S., relating to architectural control covenants and parcel owner improvements.

Section 3 amends s. 720.307, F.S., relating to the transition of association control.

Section 4 amends s. 720.308, F.S., relating to assessments and charges by the association.

Section 5 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

[8] Section 718.116, F.S.

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill requires that a certified public accountant audit the financial records at the time the members are entitled to elect at least a majority of the board of directors of the homeowners' association. It is unclear in the bill whether the developer or the members of the association are responsible for the cost of the audit. The cost of such an audit cannot be estimated as it would depend on the amount of time and effort required.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

   This bill may implicate the Contract Clause of the Florida Constitution, since many of the changes in this bill apply to existing associations. Article I, Section 10 of the Florida Constitution provides: "[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."[9]

   "A statute contravenes the constitutional prohibition against impairment of contracts when it has the effect of rewriting antecedent contracts, that is, of changing the substantive rights of the parties to existing contracts."[10] The Supreme Court of Florida held that laws impairing contracts can be unconstitutional if they unreasonably and unnecessarily impair the contractual rights of citizens.[11] The Court indicated that the "well-accepted" principle in this state is that virtually no degree of contract impairment is tolerable.[12] When seeking to determine what level of impairment is constitutionally permissible, a court "must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy."[13]

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

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[9] Article 1, Section 10(1) of the U.S. Constitution provides: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . . "

[10] 10a Fla. Jur. s. 414, Constitutional Law. The term impair is defined as "to make worse; to diminish in quantity, value, excellence, or strength; or to lessen in power or weaken." 10a Fla. Jur. s. 414, Constitutional Law.

[11] *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 (Fla. 1979). The Florida Supreme Court has adopted the method of analysis from the United States Supreme Court in cases involving the contract clause. *Pomponio*, 378 So. 2d at 780.

[12] *Pomponio*, 378 So. 2d at 780.

[13] *Id.*

C. DRAFTING ISSUES OR OTHER COMMENTS:

This bill requires that a certified public accountant audit the financial records at the time the members are entitled to elect at least a majority of the board of directors of the homeowners' association. It is unclear in the bill whether the developer or the members of the association are responsible for the cost of the audit.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

CIVIL JUSTICE COMMITTEE

On March 8, 2006, the Civil Justice Committee adopted one amendment to this bill. The amendment revises s. 720.308, F.S., by adding titles and rearranging the paragraphs and sub-paragraphs in order to clarify the bill. The bill was then reported favorably with a committee substitute.

JUDICIARY COMMITTEE

On March 22, 2006, the Judiciary Committee adopted one amendment to this bill. The amendment differs from the bill by creating a new section of Florida Statutes to specifically address architectural control covenants and parcel owner improvements. This section also authorizes the review and approval of plans and specifications and provides for rights and privileges of parcel owners as set forth in the declaration of covenants.

The amendment also provides reference to the Florida Board of Accountancy for the generally accepted accounting principles; provides that reserves are not mandatory; and provides that the waiver of reserves requires a majority vote at a meeting of the association in which a quorum is present.

Finally, the amendment provides that the provisions addressing turnover audits would apply to associations with a date of incorporation after December 31, 2006.

CHAMBER ACTION

The Judiciary Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to homeowners' associations; amending s. 720.303, F.S.; requiring the budget to provide for annual operating expenses; authorizing the budget to include reserve accounts for capital expenditures and deferred maintenance; providing the amount to be reserved; authorizing the association to adjust replacement reserve assessments annually; authorizing the developer to vote to waive the reserves or reduce the funding of reserves for a certain period; revising provisions relating to financial reporting; revising time periods in which the association must complete its reporting; creating s. 720.3035, F.S.; providing for architectural control covenants and parcel owner improvements; authorizing the review and approval of plans and specifications; providing limitations; providing rights and privileges for parcel owners as set forth in the declaration of covenants; amending s. 720.307, F.S.; requiring developers to deliver financial records to the board in any transition of association control to members;

requiring certain information to be included in the records and for the records to be prepared in a specified manner; amending s. 720.308, F.S.; providing that a guarantee of common expenses shall be effective under certain circumstances; requiring the guarantee to meet certain requirements; authorizing the guarantee to provide certain requirements; requiring the stated dollar amount of the guarantee to be an exact dollar amount for each parcel identified in the declaration; providing payments required from the guarantor to be determined in a certain manner; providing a formula to determine the guarantor's total financial obligation to the association; providing that certain expenses incurred in the production of certain revenues shall not be included in the common expenses; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (6) and (7) of section 720.303, Florida Statutes, are amended to read:

720.303 Association powers and duties; meetings of board; official records; budgets; financial reporting; association funds; recalls.--

(6) BUDGETS.--

(a) The association shall prepare an annual budget that sets out the annual operating expenses. The budget must reflect the estimated revenues and expenses for that year and the estimated surplus or deficit as of the end of the current year.

The budget must set out separately all fees or charges paid for by the association for recreational amenities, whether owned by the association, the developer, or another person. The association shall provide each member with a copy of the annual budget or a written notice that a copy of the budget is available upon request at no charge to the member. The copy must be provided to the member within the time limits set forth in subsection (5).

(b) In addition to annual operating expenses, the budget may include reserve accounts for capital expenditures and deferred maintenance for which the association is responsible to the extent that the governing documents do not limit increases in assessments, including reserves. If the budget of the association includes reserve accounts, such reserves shall be determined, maintained, and waived in the manner provided in this subsection. Once an association provides for reserve accounts in the budget, the association shall thereafter determine, maintain, and waive reserves in compliance with the provisions of this subsection.

(c) If the budget of the association does not provide for reserve accounts governed by this subsection and the association is responsible for the repair and maintenance of capital improvements that may result in a special assessment if reserves are not provided, each financial report for the preceding fiscal year required by subsection (7) shall contain the following statement in conspicuous type: THE BUDGET OF THE ASSOCIATION DOES NOT PROVIDE FOR RESERVE ACCOUNTS FOR CAPITAL EXPENDITURES AND DEFERRED MAINTENANCE THAT MAY RESULT IN SPECIAL ASSESSMENTS.

OWNERS MAY ELECT TO PROVIDE FOR RESERVE ACCOUNTS PURSUANT TO THE PROVISIONS OF SECTION 720.303(6), FLORIDA STATUTES, UPON THE APPROVAL OF NOT LESS THAN A MAJORITY OF THE TOTAL VOTING INTERESTS OF THE ASSOCIATION.

(d) An association shall be deemed to have provided for reserve accounts when reserve accounts have been initially established by the developer or when the membership of the association affirmatively elects to provide for reserves. If reserve accounts are not initially provided for by the developer, the membership of the association may elect to do so upon the affirmative approval of not less than a majority of the total voting interests of the association. Such approval may be attained by vote of the members at a duly called meeting of the membership or upon a written consent executed by not less than a majority of the total voting interests in the community. The approval action of the membership shall state that reserve accounts shall be provided for in the budget and the approval action of the membership shall designate the components for which the reserve accounts are to be established. Upon approval by the membership, the board of directors shall provide for the required reserve accounts for inclusion in the budget in the next fiscal year following the approval and in each year thereafter. Once established as provided in this subsection, the reserve accounts shall be funded or maintained or shall have their funding waived in the manner provided in paragraph (f).

(e) The amount to be reserved in any account established shall be computed by means of a formula that is based upon estimated remaining useful life and estimated replacement cost

or deferred maintenance expense of each reserve item. The association may adjust replacement reserve assessments annually to take into account any changes in estimates of cost or useful life of a reserve item.

(f) Once a reserve account or reserve accounts are established, the membership of the association upon a majority vote at a meeting at which a quorum is present may provide for no reserves or less reserves than required by this section. If a meeting of the unit owners has been called to determine whether to waive or reduce the funding of reserves and no such result is achieved or a quorum is not attained, the reserves as included in the budget shall go into effect. After the turnover, the developer may vote its voting interest to waive or reduce the funding of reserves. Any vote taken pursuant to this subsection to waive or reduce reserves shall be applicable only to one budget year.

(g) Funding formulas for reserves authorized by this section shall be based on either a separate analysis of each of the required assets or a pooled analysis of two or more of the required assets.

1. If the association maintains separate reserve accounts for each of the required assets, the amount of the contribution to each reserve account shall be the sum of the following two calculations:

a. The total amount necessary, if any, to bring a negative component balance to zero; and

b. The total estimated deferred maintenance expense or estimated replacement cost of the reserve component less the

estimated balance of the reserve component as of the beginning of the period for which the budget will be in effect. The remainder, if greater than zero, shall be divided by the estimated remaining useful life of the component. The formula may be adjusted each year for changes in estimates and deferred maintenance performed during the year and may include factors such as inflation and earnings on invested funds.

2. If the association maintains a pooled account of two or more of the required reserve assets, the amount of the contribution to the pooled reserve account as disclosed on the proposed budget shall not be less than that required to ensure that the balance on hand at the beginning of the period for which the budget will go into effect plus the projected annual cash inflows over the remaining estimated useful life of all of the assets that make up the reserve pool are equal to or greater than the projected annual cash outflows over the remaining estimated useful lives of all of the assets that make up the reserve pool, based on the current reserve analysis. The projected annual cash inflows may include estimated earnings from investment of principal. The reserve funding formula shall not include any type of balloon payments.

(h) Reserve funds and any interest accruing thereon shall remain in the reserve account or accounts and shall be used only for authorized reserve expenditures unless their use for other purposes is approved in advance by a majority vote at a meeting at which a quorum is present. Prior to turnover of control of an association by a developer to parcel owners, the developer-controlled association shall not vote to use reserves for

purposes other than that for which they were intended without the approval of a majority of all nondeveloper voting interests voting in person or by limited proxy at a duly called meeting of the association.

(7) FINANCIAL REPORTING.--Within 90 days after the end of the fiscal year, or annually on the date provided in the bylaws, the association shall prepare and complete, or contract for the preparation and completion of, a ~~an annual~~ financial report for the preceding fiscal year. Within 21 ~~60~~ days after the final financial report is completed by the association or received from the third party, but not later than 120 days after the end of the fiscal year or other date as provided in the bylaws, ~~close of the fiscal year.~~ the association shall, within the time limits set forth in subsection (5), provide each member with a copy of the annual financial report or a written notice that a copy of the financial report is available upon request at no charge to the member. Financial reports shall be prepared as follows:

(a) An association that meets the criteria of this paragraph shall prepare or cause to be prepared a complete set of financial statements in accordance with generally accepted accounting principles as adopted by the Board of Accountancy. The financial statements shall be based upon the association's total annual revenues, as follows:

1. An association with total annual revenues of $100,000 or more, but less than $200,000, shall prepare compiled financial statements.

2. An association with total annual revenues of at least $200,000, but less than $400,000, shall prepare reviewed financial statements.

3. An association with total annual revenues of $400,000 or more shall prepare audited financial statements.

(b)1. An association with total annual revenues of less than $100,000 shall prepare a report of cash receipts and expenditures.

2. An association in a community of fewer than 50 parcels, regardless of the association's annual revenues, may prepare a report of cash receipts and expenditures in lieu of financial statements required by paragraph (a) unless the governing documents provide otherwise.

3. A report of cash receipts and disbursement must disclose the amount of receipts by accounts and receipt classifications and the amount of expenses by accounts and expense classifications, including, but not limited to, the following, as applicable: costs for security, professional, and management fees and expenses; taxes; costs for recreation facilities; expenses for refuse collection and utility services; expenses for lawn care; costs for building maintenance and repair; insurance costs; administration and salary expenses; and reserves if maintained by the association.

(c) If 20 percent of the parcel owners petition the board for a level of financial reporting higher than that required by this section, the association shall duly notice and hold a meeting of members within 30 days of receipt of the petition for the purpose of voting on raising the level of reporting for that

fiscal year. Upon approval of a majority of the total voting interests of the parcel owners, the association shall prepare or cause to be prepared, shall amend the budget or adopt a special assessment to pay for the financial report regardless of any provision to the contrary in the governing documents, and shall provide within 90 days of the meeting or the end of the fiscal year, whichever occurs later:

1. Compiled, reviewed, or audited financial statements, if the association is otherwise required to prepare a report of cash receipts and expenditures;

2. Reviewed or audited financial statements, if the association is otherwise required to prepare compiled financial statements; or

3. Audited financial statements if the association is otherwise required to prepare reviewed financial statements.

(d) If approved by a majority of the voting interests present at a properly called meeting of the association, an association may prepare or cause to be prepared:

1. A report of cash receipts and expenditures in lieu of a compiled, reviewed, or audited financial statement;

2. A report of cash receipts and expenditures or a compiled financial statement in lieu of a reviewed or audited financial statement; or

3. A report of cash receipts and expenditures, a compiled financial statement, or a reviewed financial statement in lieu of an audited financial statement.

Section 2. Section 720.3035, Florida Statutes, is created to read:

720.3035 Architectural control covenants; parcel owner improvements; rights and privileges.--

(1) The authority of an association or any committee of an association to review and approve plans and specifications for the location, size, type, or appearance of any structure or other improvement on a parcel, or to enforce standards for the external appearance of any structure or improvement located on a parcel, shall only be authorized and permitted to the extent that the authority is specifically stated or reasonably inferred as to such location, size, type, or appearance in the declaration of covenants.

(2) If the declaration of covenants provides options for the use of material, the size of the structure or improvement, the design of the structure or improvement, or the location of the structure or improvement on the parcel, neither the association nor any committee of the association shall restrict the right of a parcel owner to select from the options provided in the declaration of covenants.

(3) For the purpose of establishing setback lines that are specifically stated in the declaration of covenants, each parcel shall be deemed to have only one front for purposes of determining the required front setback even if the parcel is bounded by a roadway or other easement on more than one side. When the declaration of covenants does not provide for specific setback lines, the applicable county or municipal setback lines shall apply, and neither the association nor any committee of the association shall enforce or attempt to enforce any setback

line that is inconsistent with the applicable county or municipal standard or standards.

(4) Each parcel owner shall be entitled to the rights and privileges set forth in the declaration of covenants concerning the use of the parcel, and the construction of permitted structures and improvements on the parcel and such rights and privileges shall not be unreasonably infringed upon or impaired by the association or any committee of the association. If the association or any committee of the association should infringe upon or impair the rights and privileges set forth in the declaration of covenants, the adversely affected parcel owner shall be entitled to recover damages caused by such infringement or impairment, including any costs and reasonable attorney's fees incurred in preserving or restoring the rights and privileges of the parcel owner set forth in the declaration of covenants.

(5) Neither the association nor any committee of the association shall enforce any policy or restriction that is inconsistent with the rights and privileges of a parcel owner set forth in the declaration of covenants, whether uniformly applied or not. Neither the association nor any committee of the association may rely upon a policy or restriction that is inconsistent with the declaration of covenants, whether uniformly applied or not, in defense of any action taken in the name of or on behalf of the association against a parcel owner.

Section 3. Paragraph (t) is added to subsection (3) of section 720.307, Florida Statutes, to read:

720.307 Transition of association control in a community.--With respect to homeowners' associations:

(3) At the time the members are entitled to elect at least a majority of the board of directors of the homeowners' association, the developer shall, at the developer's expense, within no more than 90 days deliver the following documents to the board:

(t) The financial records, including financial statements of the association, and source documents from the incorporation of the association through the date of turnover. The records shall be audited by an independent certified public accountant for the period from the incorporation of the association or from the period covered by the last audit, if an audit has been performed for each fiscal year since incorporation. All financial statements shall be prepared in accordance with generally accepted accounting principles and shall be audited in accordance with generally accepted auditing standards, as prescribed by the Board of Accountancy, pursuant to chapter 473. The certified public accountant performing the audit shall examine to the extent necessary supporting documents and records, including the cash disbursements and related paid invoices to determine whether expenditures were for association purposes and the billings, cash receipts, and related records of the association to determine whether the developer was charged and paid the proper amounts of assessments. This paragraph applies to associations with a date of incorporation after December 31, 2006.

Section 4. Section 720.308, Florida Statutes, is amended to read:

720.308 Assessments and charges.--

(1) ASSESSMENTS.--For any community created after October 1, 1995, the governing documents must describe the manner in which expenses are shared and specify the member's proportional share thereof. Assessments levied pursuant to the annual budget or special assessment must be in the member's proportional share of expenses as described in the governing document, which share may be different among classes of parcels based upon the state of development thereof, levels of services received by the applicable members, or other relevant factors. While the developer is in control of the homeowners' association, it may be excused from payment of its share of the operating expenses and assessments related to its parcels for any period of time for which the developer has, in the declaration, obligated itself to pay any operating expenses incurred that exceed the assessments receivable from other members and other income of the association. This section does not apply to an association, no matter when created, if the association is created in a community that is included in an effective development-of-regional-impact development order as of the effective date of this act, together with any approved modifications thereto.

(2) GUARANTEE OF COMMON EXPENSES.--

(a) Establishment of a guarantee.--If a guarantee of the assessments of parcel owners is not included in the purchase contracts or declaration, any agreement establishing a guarantee shall be effective only upon the approval of a majority of the

voting interests of the members other than the developer. Approval shall be expressed at a meeting of the members voting in person or by limited proxy or by agreement in writing without a meeting if provided in the bylaws. Such guarantee shall meet the requirements of this section.

(b) Guarantee period.--The period of time for the guarantee shall be indicated by a specific beginning and ending date or event.

1. The ending date or event shall be the same for all of the members of a homeowners' association, including members in different phases of the development.

2. The guarantee may provide for different intervals of time during a guarantee period with different dollar amounts for each such interval.

3. The guarantee may provide that after the initial stated period the developer has an option to extend the guarantee for one or more additional stated periods. The extension of a guarantee is limited to extending the ending date or event; therefore, the developer does not have the option of changing the level of assessments guaranteed.

(3) MAXIMUM LEVEL OF ASSESSMENTS.--The stated dollar amount of the guarantee shall be an exact dollar amount for each parcel identified in the declaration. Regardless of the stated dollar amount of the guarantee, assessments charged to a member shall not exceed the maximum obligation of the member based on the total amount of the adopted budget and the member's proportionate ownership share of the common elements.

(4) CASH FUNDING REQUIREMENTS DURING THE GUARANTEE.--The cash payments required from the guarantor during the guarantee period shall be determined as follows:

(a) If at any time during the guarantee period the funds collected from member assessments at the guaranteed level and other revenues collected by the association are not sufficient to provide payment, on a timely basis, of all assessments, including the full funding of the reserves unless properly waived, the guarantor shall advance sufficient cash to the association at the time such payments are due.

(b) Expenses incurred in the production of nonassessment revenues, not in excess of the nonassessment revenues, shall not be included in the assessments. If the expenses attributable to nonassessment revenues exceed nonassessment revenues, only the excess expenses must be funded by the guarantor. Interest earned on the investment of association funds may be used to pay the income tax expense incurred as a result of the investment; such expense shall not be charged to the guarantor; and the net investment income shall be retained by the association. Each such nonassessment-revenue-generating activity shall be considered separately. Any portion of the parcel assessment that is budgeted for designated capital contributions of the association shall not be used to pay operating expenses.

(5) CALCULATION OF GUARANTOR'S FINAL OBLIGATION.--The guarantor's total financial obligation to the association at the end of the guarantee period shall be determined on the accrual basis using the following formula: the guarantor shall pay any deficits that exceed the guaranteed amount, less the total

regular periodic assessments earned by the association from the members other than the guarantor during the guarantee period, regardless of whether the actual level charged was less than the maximum guaranteed amount.

(6) EXPENSES.--Expenses incurred in the production of nonassessment revenues, not in excess of the nonassessment revenues, shall not be included in the operating expenses. If the expenses attributable to nonassessment revenues exceed nonassessment revenues, only the excess expenses must be funded by the guarantor. Interest earned on the investment of association funds may be used to pay the income tax expense incurred as a result of the investment; such expense shall not be charged to the guarantor; and the net investment income shall be retained by the association. Each such nonassessment-revenue-generating activity shall be considered separately. Any portion of the parcel assessment that is budgeted for designated capital contributions of the association shall not be used to pay operating expenses.

Section 5. This act shall take effect July 1, 2006.

Amendment No. (1)

Bill No. **HB 839 CS**

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Economic Development, Trade & Banking Committee

Representative(s) Kottkamp offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Section 712.11, Florida Statutes, is created to read:

712.11 Covenant revitalization.--A homeowners' association not otherwise subject to chapter 720 may use the procedures set forth in ss. 720.403-720.407 to revive covenants that have lapsed under the terms of this chapter.

Section 2. Effective October 1, 2006, subsection (11) of section 718.110, Florida Statutes, is amended to read:

718.110 Amendment of declaration; correction of error or omission in declaration by circuit court.--

(11) The Legislature finds that the procurement of mortgagee consent to amendments that do not affect the rights or interests of mortgagees is an unreasonable and substantial logistical and financial burden on the unit owners and that there is a compelling state interest in enabling the members in

a condominium association to approve amendments to the condominium documents through legal means. Accordingly, and notwithstanding any provision to the contrary contained in this section:~~,~~

(a) As to any mortgage recorded on or after October 1, 2006, any provision in the declaration, articles of incorporation or bylaws that requires ~~any declaration recorded after April 1, 1992, may not require~~ the consent or joinder of some or all mortgagees of units or any other portion of the condominium property to or in amendments to the declaration, articles of incorporation or bylaws, or for any other matter shall be enforceable only as ~~unless the requirement is limited~~ to the following matters ~~amendments materially affecting the rights or interests of the mortgagees, or as otherwise required by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation, and unless the requirement provides that such consent may not be unreasonably withheld. It shall be presumed that, except as to~~:

1. Those matters described in subsections (4) and (8), and

2. Amendments to the declaration, articles of incorporation or by-laws which adversely affect the priority of the mortgagee's lien or the mortgagee's rights to foreclose its lien or otherwise materially affect the rights and interests of the mortgagees.

(b) As to mortgages recorded before the effective date of this amendment, any existing provisions in the declaration, articles of incorporation or by-laws requiring mortgagee consent shall be enforceable.

(c) In securing consent or joinder the association shall be entitled to rely upon the public records to identify the holders of outstanding mortgages. The association may use the address

provided in the original recorded mortgage document, unless there is a different address for the holder of the mortgage in a recorded assignment or modification of the mortgage, which recorded assignment or modification must reference the official records book and page of which the original mortgage was recorded. Once the association has identified the recorded mortgages of record, the association shall request of each unit owner whose unit is encumbered by a mortgage of record any information the owner has in his or her possession regarding the name and address of the person to whom mortgage payments are currently being made. Notice shall be sent to such person if it is in addition to the name and address of the mortgagee or assignee of the mortgage as shown by the public record. The association shall be deemed to have complied with this requirement by making the written request of the unit owners required hereunder. Any notices required to be sent to the mortgagees hereunder shall be sent to all available addresses provided to the association.

(d) Any notice to the mortgagees required hereunder may be sent by a method that establishes proof of delivery, and any mortgagee who fails to respond within sixty (60) days of the date of mailing shall be deemed to have consented to the amendment.

(e) For those amendments requiring mortgagee consent on or after October 1, 2006, ~~do not materially affect the rights or interests of mortgagees.~~ in the event mortgagee consent is provided other than by properly recorded joinder, such consent shall be evidenced by affidavit of the association recorded in the public records of the county where the declaration is recorded. Any amendment adopted without the required consent of a mortgagee shall be voidable only by a mortgagee who was

entitled to notice and an opportunity to consent. An action to void an amendment shall be subject to the statute of limitations beginning five years from the date of discovery as to the amendments described in subparagraph (a)1. hereinabove and five (5) years from the date of recordation of the certificate of amendment for all other amendments. This provision shall apply to all mortgages, regardless of the date of recordation of the mortgage.

Section 3. Paragraph (l) of subsection (2) of section 718.112, Florida Statutes, is amended to read:

718.112 Bylaws.--

(2) REQUIRED PROVISIONS.--The bylaws shall provide for the following and, if they do not do so, shall be deemed to include the following:

(l) Certificate of compliance.--There shall be a provision that a certificate of compliance from a licensed electrical contractor or electrician may be accepted by the association's board as evidence of compliance of the condominium units with the applicable fire and life safety code. Notwithstanding the provisions of chapter 633 or of any other code, statute, ordinance, administrative rule, or regulation, or any interpretation of the foregoing, an association, condominium, or unit owner is not obligated to retrofit the common elements or units of a residential condominium with a fire sprinkler system or other engineered lifesafety system in a building that has been certified for occupancy by the applicable governmental entity, if the unit owners have voted to forego such retrofitting and engineered lifesafety system by the affirmative vote of two-thirds of all voting interests in the affected condominium. However, a condominium association may not vote to forego the retrofitting with a fire sprinkler system of common

areas in a high-rise building. For purposes of this subsection, the term "high-rise building" means a building that is greater than 75 feet in height where the building height is measured from the lowest level of fire department access to the floor of the highest occupiable story. For purposes of this subsection, the term "common areas" means any enclosed hallway, corridor, lobby, stairwell, or entryway. In no event shall the local authority having jurisdiction require completion of retrofitting of common areas with a sprinkler system before the end of 2025 ~~2014~~.

1. A vote to forego retrofitting may be obtained by limited proxy or by a ballot personally cast at a duly called membership meeting, or by execution of a written consent by the member, and shall be effective upon the recording of a certificate attesting to such vote in the public records of the county where the condominium is located. The association shall mail, hand deliver, or electronically transmit to each unit owner written notice at least 14 days prior to such membership meeting in which the vote to forego retrofitting of the required fire sprinkler system is to take place. Within 30 days after the association's opt-out vote, notice of the results of the opt-out vote shall be mailed, hand delivered, or electronically transmitted to all unit owners. Evidence of compliance with this 30-day notice shall be made by an affidavit executed by the person providing the notice and filed among the official records of the association. After such notice is provided to each owner, a copy of such notice shall be provided by the current owner to a new owner prior to closing and shall be provided by a unit owner to a renter prior to signing a lease.

2. As part of the information collected annually from condominiums, the division shall require condominium

associations to report the membership vote and recording of a certificate under this subsection and, if retrofitting has been undertaken, the per-unit cost of such work. The division shall annually report to the Division of State Fire Marshal of the Department of Financial Services the number of condominiums that have elected to forego retrofitting.

Section 4. Section 718.114, Florida Statutes, is amended to read:

718.114 Association powers.--An association has the power to enter into agreements, to acquire leaseholds, memberships, and other possessory or use interests in lands or facilities such as country clubs, golf courses, marinas, and other recreational facilities. It has this power whether or not the lands or facilities are contiguous to the lands of the condominium, if they are intended to provide enjoyment, recreation, or other use or benefit to the unit owners. All of these leaseholds, memberships, and other possessory or use interests existing or created at the time of recording the declaration must be stated and fully described in the declaration. Subsequent to the recording of the declaration, agreements acquiring these leaseholds, memberships, or other possessory or use interests not entered into within 12 months following the recording of the declaration shall be considered a material alteration or substantial addition to the real property that is association property, and the association may not acquire or enter into agreements acquiring these leaseholds, memberships, or other possessory or use interests except as authorized by the declaration as provided in s. 718.113. The declaration may provide that the rental, membership fees, operations, replacements, and other expenses are common expenses and may impose covenants and restrictions concerning their use

and may contain other provisions not inconsistent with this chapter. A condominium association may conduct bingo games as provided in s. 849.0931.

Section 5. Subsections (1) and (2) of section 718.404, Florida Statutes, are amended to read:

718.404 Mixed-use condominiums.--When a condominium consists of both residential and commercial units, the following provisions shall apply:

(1) The condominium documents shall not provide that the owner of any commercial unit shall have the authority to veto amendments to the declaration, articles of incorporation, bylaws, or rules or regulations of the association. This subsection shall apply retroactively as a remedial measure.

(2) Subject to s. 718.301, where the number of residential units in the condominium equals or exceeds 50 percent of the total units operated by the association, owners of the residential units shall be entitled to vote for a majority of the seats on the board of administration. This subsection shall apply retroactively as a remedial measure.

Section 6. Subsections (4) and (5) of section 720.302, Florida Statutes, are amended to read:

720.302 Purposes, scope, and application.--

(4) This chapter does not apply to any association that is subject to regulation under chapter 718, chapter 719, or chapter 721~~,~~ or to any nonmandatory association formed under chapter 723, except to the extent that a provision of chapter 718, chapter 719, or chapter 721 is expressly incorporated into this chapter for the purpose of regulating homeowners' associations.

(5) Unless expressly stated to the contrary, corporations ~~not for profit~~ that operate residential homeowners' associations in this state shall be governed by and subject to chapter 607,

if the association was incorporated thereunder, or to chapter 617, if the association was incorporated thereunder, and this chapter. This subsection is intended to clarify existing law.

Section 7. Paragraph (a) of subsection (2), and subsections (5), (6), and (7) of section 720.303, Florida Statutes, as amended by section 18 of chapter 2004-345 and section 135 of chapter 2005-2, Laws of Florida, are amended, and paragraph (d) is added to subsection (5) of that section, to read:

720.303 Association powers and duties; meetings of board; official records; budgets; financial reporting; association funds; recalls.--

(2) BOARD MEETINGS.--

(a) A meeting of the board of directors of an association occurs whenever a quorum of the board gathers to conduct association business. All meetings of the board must be open to all members except for meetings between the board and its attorney with respect to proposed or pending litigation where the contents of the discussion would otherwise be governed by the attorney-client privilege. The provisions of this subsection shall also apply to the meetings of any committee or other similar body when a final decision will be made regarding the expenditure of association funds and to meetings of any body vested with the power to approve or disapprove architectural decisions with respect to a specific parcel of residential property owned by a member of the community.

(5) INSPECTION AND COPYING OF RECORDS.--The official records shall be maintained within the state and must be open to inspection and available for photocopying by members or their authorized agents at reasonable times and places within 10 business days after receipt of a written request for access.

This subsection may be complied with by having a copy of the official records available for inspection or copying in the community. If the association has a photocopy machine available where the records are maintained, it must provide parcel owners with copies on request during the inspection if the entire request is limited to no more than 25 pages.

(d) The association or its authorized agent is not required to provide a prospective purchaser or lienholder with information about the residential subdivision or the association other than information or documents required by this chapter to be made available or disclosed. The association or its authorized agent may charge a reasonable fee to the prospective purchaser or lienholder or the current parcel owner or member for providing good faith responses to requests for information by or on behalf of a prospective purchaser or lienholder, other than that required by law, if the fee does not exceed $50 plus the reasonable cost of photocopying and any attorney's fees incurred by the association in connection with the response.

(6) BUDGETS.--

(a) The association shall prepare an annual budget that sets out the annual operating expenses. The budget must reflect the estimated revenues and expenses for that year and the estimated surplus or deficit as of the end of the current year. The budget must set out separately all fees or charges paid for by the association for recreational amenities, whether owned by the association, the developer, or another person. The association shall provide each member with a copy of the annual budget or a written notice that a copy of the budget is available upon request at no charge to the member. The copy must be provided to the member within the time limits set forth in subsection (5).

(b) In addition to annual operating expenses, the budget may include reserve accounts for capital expenditures and deferred maintenance for which the association is responsible to the extent that the governing documents do not limit increases in assessments, including reserves. If the budget of the association includes reserve accounts, such reserves shall be determined, maintained, and waived in the manner provided in this subsection. Once an association provides for reserve accounts in the budget, the association shall thereafter determine, maintain, and waive reserves in compliance with the provisions of this subsection.

(c) If the budget of the association does not provide for reserve accounts governed by this subsection and the association is responsible for the repair and maintenance of capital improvements that may result in a special assessment if reserves are not provided, each financial report for the preceding fiscal year required by subsection (7) shall contain the following statement in conspicuous type: THE BUDGET OF THE ASSOCIATION DOES NOT PROVIDE FOR RESERVE ACCOUNTS FOR CAPITAL EXPENDITURES AND DEFERRED MAINTENANCE THAT MAY RESULT IN SPECIAL ASSESSMENTS. OWNERS MAY ELECT TO PROVIDE FOR RESERVE ACCOUNTS PURSUANT TO THE PROVISIONS OF SECTION 720.303(6), FLORIDA STATUTES, UPON THE APPROVAL OF NOT LESS THAN A MAJORITY OF THE TOTAL VOTING INTERESTS OF THE ASSOCIATION.

(d) An association shall be deemed to have provided for reserve accounts when reserve accounts have been initially established by the developer or when the membership of the association affirmatively elects to provide for reserves. If reserve accounts are not initially provided for by the developer, the membership of the association may elect to do so upon the affirmative approval of not less than a majority of the

total voting interests of the association. Such approval may be attained by vote of the members at a duly called meeting of the membership or upon a written consent executed by not less than a majority of the total voting interests in the community. The approval action of the membership shall state that reserve accounts shall be provided for in the budget and the approval action of the membership shall designate the components for which the reserve accounts are to be established. Upon approval by the membership, the board of directors shall provide for the required reserve accounts for inclusion in the budget in the next fiscal year following the approval and in each year thereafter. Once established as provided in this subsection, the reserve accounts shall be funded or maintained or shall have their funding waived in the manner provided in paragraph (f).

(e) The amount to be reserved in any account established shall be computed by means of a formula that is based upon estimated remaining useful life and estimated replacement cost or deferred maintenance expense of each reserve item. The association may adjust replacement reserve assessments annually to take into account any changes in estimates of cost or useful life of a reserve item.

(f) Once a reserve account or reserve accounts are established, the membership of the association upon a majority vote at a meeting at which a quorum is present may provide for no reserves or less reserves than required by this section. If a meeting of the unit owners has been called to determine whether to waive or reduce the funding of reserves and no such result is achieved or a quorum is not attained, the reserves as included in the budget shall go into effect. After the turnover, the developer may vote its voting interest to waive or reduce the funding of reserves. Any vote taken pursuant to this subsection

to waive or reduce reserves shall be applicable only to one budget year.

(g) Funding formulas for reserves authorized by this section shall be based on either a separate analysis of each of the required assets or a pooled analysis of two or more of the required assets.

1. If the association maintains separate reserve accounts for each of the required assets, the amount of the contribution to each reserve account shall be the sum of the following two calculations:

a. The total amount necessary, if any, to bring a negative component balance to zero; and

b. The total estimated deferred maintenance expense or estimated replacement cost of the reserve component less the estimated balance of the reserve component as of the beginning of the period for which the budget will be in effect. The remainder, if greater than zero, shall be divided by the estimated remaining useful life of the component. The formula may be adjusted each year for changes in estimates and deferred maintenance performed during the year and may include factors such as inflation and earnings on invested funds.

2. If the association maintains a pooled account of two or more of the required reserve assets, the amount of the contribution to the pooled reserve account as disclosed on the proposed budget shall not be less than that required to ensure that the balance on hand at the beginning of the period for which the budget will go into effect plus the projected annual cash inflows over the remaining estimated useful life of all of the assets that make up the reserve pool are equal to or greater than the projected annual cash outflows over the remaining estimated useful lives of all of the assets that make up the

reserve pool, based on the current reserve analysis. The projected annual cash inflows may include estimated earnings from investment of principal. The reserve funding formula shall not include any type of balloon payments.

(h) Reserve funds and any interest accruing thereon shall remain in the reserve account or accounts and shall be used only for authorized reserve expenditures unless their use for other purposes is approved in advance by a majority vote at a meeting at which a quorum is present. Prior to turnover of control of an association by a developer to parcel owners, the developer-controlled association shall not vote to use reserves for purposes other than that for which they were intended without the approval of a majority of all nondeveloper voting interests voting in person or by limited proxy at a duly called meeting of the association.

(7) FINANCIAL REPORTING.--Within 90 days after the end of the fiscal year, or annually on the date provided in the bylaws, the association shall prepare and complete, or contract for the preparation and completion of, a ~~an annual~~ financial report for the preceding fiscal year. Within 21 ~~60~~ days after the final financial report is completed by the association or received from the third party, but not later than 120 days after the end of the fiscal year or other date as provided in the bylaws, ~~close of the fiscal year.~~ the association shall, within the time limits set forth in subsection (5), provide each member with a copy of the annual financial report or a written notice that a copy of the financial report is available upon request at no charge to the member. Financial reports shall be prepared as follows:

(a) An association that meets the criteria of this paragraph shall prepare or cause to be prepared a complete set

of financial statements in accordance with generally accepted accounting principles as adopted by the Board of Accountancy. The financial statements shall be based upon the association's total annual revenues, as follows:

1. An association with total annual revenues of $100,000 or more, but less than $200,000, shall prepare compiled financial statements.

2. An association with total annual revenues of at least $200,000, but less than $400,000, shall prepare reviewed financial statements.

3. An association with total annual revenues of $400,000 or more shall prepare audited financial statements.

(b)1. An association with total annual revenues of less than $100,000 shall prepare a report of cash receipts and expenditures.

2. An association in a community of fewer than 50 parcels, regardless of the association's annual revenues, may prepare a report of cash receipts and expenditures in lieu of financial statements required by paragraph (a) unless the governing documents provide otherwise.

3. A report of cash receipts and disbursement must disclose the amount of receipts by accounts and receipt classifications and the amount of expenses by accounts and expense classifications, including, but not limited to, the following, as applicable: costs for security, professional, and management fees and expenses; taxes; costs for recreation facilities; expenses for refuse collection and utility services; expenses for lawn care; costs for building maintenance and repair; insurance costs; administration and salary expenses; and reserves if maintained by the association.

(c) If 20 percent of the parcel owners petition the board for a level of financial reporting higher than that required by this section, the association shall duly notice and hold a meeting of members within 30 days of receipt of the petition for the purpose of voting on raising the level of reporting for that fiscal year. Upon approval of a majority of the total voting interests of the parcel owners, the association shall prepare or cause to be prepared, shall amend the budget or adopt a special assessment to pay for the financial report regardless of any provision to the contrary in the governing documents, and shall provide within 90 days of the meeting or the end of the fiscal year, whichever occurs later:

1. Compiled, reviewed, or audited financial statements, if the association is otherwise required to prepare a report of cash receipts and expenditures;

2. Reviewed or audited financial statements, if the association is otherwise required to prepare compiled financial statements; or

3. Audited financial statements if the association is otherwise required to prepare reviewed financial statements.

(d) If approved by a majority of the voting interests present at a properly called meeting of the association, an association may prepare or cause to be prepared:

1. A report of cash receipts and expenditures in lieu of a compiled, reviewed, or audited financial statement;

2. A report of cash receipts and expenditures or a compiled financial statement in lieu of a reviewed or audited financial statement; or

3. A report of cash receipts and expenditures, a compiled financial statement, or a reviewed financial statement in lieu of an audited financial statement.

Section 8. Subsection (2) of section 720.303, Florida Statutes, as amended by section 2 of chapter 2004-345 and section 15 of chapter 2004-353, Laws of Florida, is repealed.

Section 9. Section 720.3035, Florida Statutes, is created to read:

720.3035 Architectural control covenants; parcel owner improvements; rights and privileges.--

(1) The authority of an association or any architectural, construction improvement, or other such similar committee of an association to review and approve plans and specifications for the location, size, type, or appearance of any structure or other improvement on a parcel, or to enforce standards for the external appearance of any structure or improvement located on a parcel, shall only be permitted to the extent that the authority is specifically stated or reasonably inferred as to such location, size, type, or appearance in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants.

(2) If the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants provides options for the use of material, the size of the structure or improvement, the design of the structure or improvement, or the location of the structure or improvement on the parcel, neither the association nor any architectural, construction improvement, or other such similar committee of the association shall restrict the right of a parcel owner to select from the options provided in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants.

(3) Unless otherwise specifically stated in the declaration of covenants or other published guidelines and

standards authorized by the declaration of covenants, each parcel shall be deemed to have only one front for purposes of determining the required front setback even if the parcel is bounded by a roadway or other easement on more than one side. When the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants does not provide for specific setback limitations, the applicable county or municipal setback limitations shall apply, and neither the association nor any architectural, construction improvement, or other such similar committee of the association shall enforce or attempt to enforce any setback limitation that is inconsistent with the applicable county or municipal standard or standards.

(4) Each parcel owner shall be entitled to the rights and privileges set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants concerning the use of the parcel, and the construction of permitted structures and improvements on the parcel and such rights and privileges shall not be unreasonably infringed upon or impaired by the association or any architectural, construction improvement, or other such similar committee of the association. If the association or any architectural, construction improvement, or other such similar committee of the association should knowingly and willfully infringe upon or impair the rights and privileges set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, the adversely affected parcel owner shall be entitled to recover damages caused by such infringement or impairment, including any costs and reasonable attorney's fees incurred in preserving or restoring the rights and privileges of the parcel owner set

forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants.

(5) Neither the association nor any architectural, construction improvement, or other such similar committee of the association shall enforce any policy or restriction that is inconsistent with the rights and privileges of a parcel owner set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, whether uniformly applied or not. Neither the association nor any architectural, construction improvement, or other such similar committee of the association may rely upon a policy or restriction that is inconsistent with the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, whether uniformly applied or not, in defense of any action taken in the name of or on behalf of the association against a parcel owner.

Section 10. Subsection (1) of section 720.305, Florida Statutes, is amended to read:

720.305 Obligations of members; remedies at law or in equity; levy of fines and suspension of use rights; failure to fill sufficient number of vacancies on board of directors to constitute a quorum; appointment of receiver upon petition of any member.--

(1) Each member and the member's tenants, guests, and invitees, and each association, are governed by, and must comply with, this chapter, the governing documents of the community, and the rules of the association. Actions at law or in equity, or both, to redress alleged failure or refusal to comply with these provisions may be brought by the association or by any member against:

(a) The association;

(b) A member;

(c) Any director or officer of an association who willfully and knowingly fails to comply with these provisions; and

(d) Any tenants, guests, or invitees occupying a parcel or using the common areas.

The prevailing party in any such litigation is entitled to recover reasonable attorney's fees and costs. A member prevailing in an action between the association and the member under this section, in addition to recovering his or her reasonable attorney's fees, may recover additional amounts as determined by the court to be necessary to reimburse the member for his or her share of assessments levied by the association to fund its expenses of the litigation. This relief does not exclude other remedies provided by law. This section does not deprive any person of any other available right or remedy.

Section 11. Paragraph (c) of subsection (1) of section 720.306, Florida Statutes, is amended to read:

720.306 Meetings of members; voting and election procedures; amendments.--

(1) QUORUM; AMENDMENTS.--

(c) Unless otherwise provided in the governing documents as originally recorded or permitted by this chapter or chapter 617, an amendment may not materially and adversely alter the proportionate voting interest appurtenant to a parcel or increase the proportion or percentage by which a parcel shares in the common expenses of the association unless the record parcel owner and all record owners of liens on the parcels join in the execution of the amendment. For purposes of this section,

a change in quorum requirements is not an alteration of voting interests. The merger or consolidation of one or more associations under a plan of merger or consolidation under chapter 607 or chapter 617 shall not be considered a material or adverse alteration of the proportionate voting interest appurtenant to a parcel.

Section 12. Paragraph (t) is added to subsection (3) of section 720.307, Florida Statutes, to read:

720.307 Transition of association control in a community.--With respect to homeowners' associations:

(3) At the time the members are entitled to elect at least a majority of the board of directors of the homeowners' association, the developer shall, at the developer's expense, within no more than 90 days deliver the following documents to the board:

(t) The financial records, including financial statements of the association, and source documents from the incorporation of the association through the date of turnover. The records shall be audited by an independent certified public accountant for the period from the incorporation of the association or from the period covered by the last audit, if an audit has been performed for each fiscal year since incorporation. All financial statements shall be prepared in accordance with generally accepted accounting principles and shall be audited in accordance with generally accepted auditing standards, as prescribed by the Board of Accountancy, pursuant to chapter 473. The certified public accountant performing the audit shall examine to the extent necessary supporting documents and records, including the cash disbursements and related paid invoices to determine whether expenditures were for association purposes and the billings, cash receipts, and related records of

the association to determine whether the developer was charged and paid the proper amounts of assessments. This paragraph applies to associations with a date of incorporation after December 31, 2006.

Section 13. Section 720.308, Florida Statutes, is amended to read:

720.308 Assessments and charges.--

(1) ASSESSMENTS.--For any community created after October 1, 1995, the governing documents must describe the manner in which expenses are shared and specify the member's proportional share thereof. Assessments levied pursuant to the annual budget or special assessment must be in the member's proportional share of expenses as described in the governing document, which share may be different among classes of parcels based upon the state of development thereof, levels of services received by the applicable members, or other relevant factors. While the developer is in control of the homeowners' association, it may be excused from payment of its share of the operating expenses and assessments related to its parcels for any period of time for which the developer has, in the declaration, obligated itself to pay any operating expenses incurred that exceed the assessments receivable from other members and other income of the association. This section does not apply to an association, no matter when created, if the association is created in a community that is included in an effective development-of-regional-impact development order as of the effective date of this act, together with any approved modifications thereto.

(2) GUARANTEE OF COMMON EXPENSES.--

(a) Establishment of a guarantee.--If a guarantee of the assessments of parcel owners is not included in the purchase contracts or declaration, any agreement establishing a guarantee

shall be effective only upon the approval of a majority of the voting interests of the members other than the developer. Approval shall be expressed at a meeting of the members voting in person or by limited proxy or by agreement in writing without a meeting if provided in the bylaws. Such guarantee shall meet the requirements of this section.

(b) Guarantee period.--The period of time for the guarantee shall be indicated by a specific beginning and ending date or event.

1. The ending date or event shall be the same for all of the members of a homeowners' association, including members in different phases of the development.

2. The guarantee may provide for different intervals of time during a guarantee period with different dollar amounts for each such interval.

3. The guarantee may provide that after the initial stated period the developer has an option to extend the guarantee for one or more additional stated periods. The extension of a guarantee is limited to extending the ending date or event; therefore, the developer does not have the option of changing the level of assessments guaranteed.

(3) MAXIMUM LEVEL OF ASSESSMENTS.--The stated dollar amount of the guarantee shall be an exact dollar amount for each parcel identified in the declaration. Regardless of the stated dollar amount of the guarantee, assessments charged to a member shall not exceed the maximum obligation of the member based on the total amount of the adopted budget and the member's proportionate ownership share of the common elements.

(4) CASH FUNDING REQUIREMENTS DURING THE GUARANTEE.--The cash payments required from the guarantor during the guarantee period shall be determined as follows:

(a) If at any time during the guarantee period the funds collected from member assessments at the guaranteed level and other revenues collected by the association are not sufficient to provide payment, on a timely basis, of all assessments, including the full funding of the reserves unless properly waived, the guarantor shall advance sufficient cash to the association at the time such payments are due.

(b) Expenses incurred in the production of nonassessment revenues, not in excess of the nonassessment revenues, shall not be included in the assessments. If the expenses attributable to nonassessment revenues exceed nonassessment revenues, only the excess expenses must be funded by the guarantor. Interest earned on the investment of association funds may be used to pay the income tax expense incurred as a result of the investment; such expense shall not be charged to the guarantor; and the net investment income shall be retained by the association. Each such nonassessment-revenue-generating activity shall be considered separately. Any portion of the parcel assessment that is budgeted for designated capital contributions of the association shall not be used to pay operating expenses.

(5) CALCULATION OF GUARANTOR'S FINAL OBLIGATION.--The guarantor's total financial obligation to the association at the end of the guarantee period shall be determined on the accrual basis using the following formula: the guarantor shall pay any deficits that exceed the guaranteed amount, less the total regular periodic assessments earned by the association from the members other than the guarantor during the guarantee period, regardless of whether the actual level charged was less than the maximum guaranteed amount.

(6) EXPENSES.--Expenses incurred in the production of nonassessment revenues, not in excess of the nonassessment

revenues, shall not be included in the operating expenses. If the expenses attributable to nonassessment revenues exceed nonassessment revenues, only the excess expenses must be funded by the guarantor. Interest earned on the investment of association funds may be used to pay the income tax expense incurred as a result of the investment; such expense shall not be charged to the guarantor; and the net investment income shall be retained by the association. Each such nonassessment-revenue-generating activity shall be considered separately. Any portion of the parcel assessment that is budgeted for designated capital contributions of the association shall not be used to pay operating expenses.

Section 14. Section 720.311, Florida Statutes, is amended to read:

720.311 Dispute resolution.--

(1) The Legislature finds that alternative dispute resolution has made progress in reducing court dockets and trials and in offering a more efficient, cost-effective option to litigation. The filing of any petition for ~~mediation or~~ arbitration or the serving of an offer for presuit mediation as provided for in this section shall toll the applicable statute of limitations. Any recall dispute filed with the department pursuant to s. 720.303(10) shall be conducted by the department in accordance with the provisions of ss. 718.112(2)(j) and 718.1255 and the rules adopted by the division. In addition, the department shall conduct mandatory binding arbitration of election disputes between a member and an association pursuant to s. 718.1255 and rules adopted by the division. Neither election disputes nor recall disputes are eligible for presuit mediation; these disputes shall be arbitrated by the department. At the conclusion of the proceeding, the department shall charge

the parties a fee in an amount adequate to cover all costs and expenses incurred by the department in conducting the proceeding. Initially, the petitioner shall remit a filing fee of at least $200 to the department. The fees paid to the department shall become a recoverable cost in the arbitration proceeding, and the prevailing party in an arbitration proceeding shall recover its reasonable costs and attorney's fees in an amount found reasonable by the arbitrator. The department shall adopt rules to effectuate the purposes of this section.

(2)(a) Disputes between an association and a parcel owner regarding use of or changes to the parcel or the common areas and other covenant enforcement disputes, disputes regarding amendments to the association documents, disputes regarding meetings of the board and committees appointed by the board, membership meetings not including election meetings, and access to the official records of the association shall be the subject of an offer ~~filed with the department~~ for presuit ~~mandatory~~ mediation served by an aggrieved party before the dispute is filed in court. Presuit mediation proceedings must be conducted in accordance with the applicable Florida Rules of Civil Procedure, and these proceedings are privileged and confidential to the same extent as court-ordered mediation. Disputes subject to presuit mediation under this section shall not include the collection of any assessment, fine, or other financial obligation, including attorney's fees and costs, claimed to be due or any action to enforce a prior mediation settlement agreement between the parties. Also, in any dispute subject to presuit mediation under this section where emergency relief is required, a motion for temporary injunctive relief may be filed with the court without first complying with the presuit

mediation requirements of this section. After any issues regarding emergency or temporary relief are resolved, the court may either refer the parties to a mediation program administered by the courts or require mediation under this section. An arbitrator or judge may not consider any information or evidence arising from the presuit mediation proceeding except in a proceeding to impose sanctions for failure to attend a presuit mediation session or with the parties' agreement in a proceeding seeking to enforce the agreement. Persons who are not parties to the dispute may not attend the presuit mediation conference without the consent of all parties, except for counsel for the parties and a corporate representative designated by the association. When mediation is attended by a quorum of the board, such mediation is not a board meeting for purposes of notice and participation set forth in s. 720.303. An aggrieved party shall serve on the responding party a written offer to participate in presuit mediation in substantially the following form:

STATUTORY OFFER TO PARTICIPATE IN PRESUIT MEDIATION

The alleged aggrieved party, _____, hereby offers to _____, as the responding party, to enter into presuit mediation in connection with the following dispute, which by statute is of a type that is subject to presuit mediation:

(List specific nature of the dispute or disputes to be mediated and the authority supporting a finding of a violation as to each dispute.)

Pursuant to section 720.311, Florida Statutes, this offer to resolve the dispute through presuit mediation is required before a lawsuit can be filed concerning the dispute. Pursuant to the statute, the aggrieved party is hereby offering to engage in presuit mediation with a neutral third-party mediator in order to attempt to resolve this dispute without court action, and the aggrieved party demands that you likewise agree to this process. If you fail to agree to presuit mediation, or if you agree and later fail to follow through with your agreement to mediate, suit may be brought against you without further warning.

The process of mediation involves a supervised negotiation process in which a trained, neutral third-party mediator meets with both parties and assists them in exploring possible opportunities for resolving part or all of the dispute. The mediation process is a voluntary one. By agreeing to participate in presuit mediation, you are not bound in any way to change your position or to enter into any type of agreement. Furthermore, the mediator has no authority to make any decisions in this matter or to determine who is right or wrong and merely acts as a facilitator to ensure that each party understands the position of the other party and that all reasonable settlement options are fully explored. All mediation communications are confidential under the Mediation Confidentiality and Privilege Act pursuant to sections 44.401044.406, Florida Statutes, and a mediation participant may not disclose a mediation communication to a person other

than a mediation participant or a participant's counsel.

If an agreement is reached, it shall be reduced to writing and becomes a binding and enforceable commitment of the parties. A resolution of one or more disputes in this fashion avoids the need to litigate these issues in court. The failure to reach an agreement, or the failure of a party to participate in the process, results in the mediator's declaring an impasse in the mediation, after which the aggrieved party may proceed to court on all outstanding, unsettled disputes.

The aggrieved party has selected and hereby lists three certified mediators who we believe to be neutral and qualified to mediate the dispute. You have the right to select any one of these mediators. The fact that one party may be familiar with one or more of the listed mediators does not mean that the mediator cannot act as a neutral and impartial facilitator. Any mediator who cannot act in this capacity ethically must decline to accept engagement. The mediators that we suggest, and their current hourly rates, are as follows:

(List the names, addresses, telephone numbers, and hourly rates of the mediators. Other pertinent information about the background of the mediators may be included as an attachment.)

You may contact the offices of these mediators to confirm that the listed mediators will be neutral and will not show any favoritism toward either party. The names of certified mediators may be found through the office of the clerk of the circuit court for this circuit.

If you agree to participate in the presuit mediation process, the statute requires that each party is to pay one-half of the costs and fees involved in the presuit mediation process unless otherwise agreed by all parties. An average mediation may require 3 to 4 hours of the mediator's time, including some preparation time, and each party would need to pay one-half of the mediator's fees as well as his or her own attorney's fees if he or she chooses to employ an attorney in connection with the mediation. However, use of an attorney is not required and is at the option of each party. The mediator may require the advance payment of some or all of the anticipated fees. The aggrieved party hereby agrees to pay or prepay one-half of the mediator's estimated fees and to forward this amount or such other reasonable advance deposits as the mediator may require for this purpose. Any funds deposited will be returned to you if these are in excess of your share of the fees incurred.

If you agree to participate in presuit mediation in order to attempt to resolve the dispute and thereby avoid further legal action, please sign below and

clearly indicate which mediator is acceptable to you. We will then ask the mediator to schedule a mutually convenient time and place for the mediation conference to be held. The mediation conference must be held within 90 days after the date of this letter unless extended by mutual written agreement. In the event that you fail to respond within 20 days after the date of this letter, or if you fail to agree to at least one of the mediators that we have suggested and to pay or prepay to the mediator one-half of the costs involved, the aggrieved party will be authorized to proceed with the filing of a lawsuit against you without further notice and may seek an award of attorney's fees or costs incurred in attempting to obtain mediation.

Should you wish, you may also elect to waive presuit mediation so that this matter may proceed directly to court.

Therefore, please give this matter your immediate attention. By law, your response must be mailed by certified mail, return receipt requested, with an additional copy being sent by regular first-class mail to the address shown on this offer.

_____

_____

RESPONDING PARTY: CHOOSE ONLY ONE OF THE TWO OPTIONS BELOW. YOUR SIGNATURE INDICATES YOUR AGREEMENT TO THAT CHOICE.

AGREEMENT TO MEDIATE

The undersigned hereby agrees to participate in presuit mediation and agrees to the following mediator or mediators as acceptable to mediate this dispute:

(List acceptable mediator or mediators.)

I/we further agree to pay or prepay one-half of the mediator's fees and to forward such advance deposits as the mediator may require for this purpose.

_____

Signature of responding party #1

_____

Signature of responding party #2 (if applicable)(if property is owned by more than one person, all owners must sign)

WAIVER OF MEDIATION

The undersigned hereby waives the right to participate in presuit mediation of the dispute listed above and agrees to allow the aggrieved party to proceed in court on such matters.

949 _____

950 Signature of responding party #1

951

952 _____

953 Signature of responding party #2 (if applicable)(if

954 property is owned by more than one person, all owners

955 must sign)

956

957 (b) Service of the statutory offer to participate in

958 presuit mediation shall be effected by sending a letter in

959 substantial conformity with the above form by certified mail,

960 return receipt requested, with an additional copy being sent by

961 regular first-class mail, to the address of the responding party

962 as it last appears on the books and records of the association.

963 The responding party shall have 20 days from the date of the

964 mailing of the statutory offer to serve a response to the

965 aggrieved party in writing. The response shall be served by

966 certified mail, return receipt requested, with an additional

967 copy being sent by regular first-class mail, to the address

968 shown on the statutory offer. In the alternative, the responding

969 party may waive mediation in writing. Notwithstanding the

970 foregoing, once the parties have agreed on a mediator, the

971 mediator may reschedule the mediation for a date and time

972 mutually convenient to the parties. ~~The department shall conduct~~

973 ~~the proceedings through the use of department mediators or refer~~

974 ~~the disputes to private mediators who have been duly certified~~

975 ~~by the department as provided in paragraph (c).~~ The parties

976 shall share the costs of presuit mediation equally, including

977 the fee charged by the mediator, if any, unless the parties

978 agree otherwise, and the mediator may require advance payment of

979 its reasonable fees and costs. The failure of any party to

respond to a demand or response, to agree upon a mediator, to make payment of fees and costs within the time established by the mediator, or to appear for a scheduled mediation session shall operate as an impasse in the presuit mediation by such party, entitling the other party to proceed in court and to seek an award of the costs and fees associated with the mediation. Additionally, if any presuit mediation session cannot be scheduled and conducted within 90 days after the offer to participate in mediation was filed, an impasse shall be deemed to have occurred unless both parties agree to extend this deadline. ~~If a department mediator is used, the department may charge such fee as is necessary to pay expenses of the mediation, including, but not limited to, the salary and benefits of the mediator and any travel expenses incurred. The petitioner shall initially file with the department upon filing the disputes, a filing fee of $200, which shall be used to defray the costs of the mediation. At the conclusion of the mediation, the department shall charge to the parties, to be shared equally unless otherwise agreed by the parties, such further fees as are necessary to fully reimburse the department for all expenses incurred in the mediation.~~

(c) ~~(b)~~ If presuit mediation as described in paragraph (a) is not successful in resolving all issues between the parties, the parties may file the unresolved dispute in a court of competent jurisdiction or elect to enter into binding or nonbinding arbitration pursuant to the procedures set forth in s. 718.1255 and rules adopted by the division, with the arbitration proceeding to be conducted by a department arbitrator or by a private arbitrator certified by the department. If all parties do not agree to arbitration proceedings following an unsuccessful mediation, any party may

file the dispute in court. A final order resulting from nonbinding arbitration is final and enforceable in the courts if a complaint for trial de novo is not filed in a court of competent jurisdiction within 30 days after entry of the order. As to any issue or dispute that is not resolved at presuit mediation, and as to any issue that is settled at presuit mediation but is thereafter subject to an action seeking enforcement of the mediation settlement, the prevailing party in any subsequent arbitration or litigation proceeding shall be entitled to seek recovery of all costs and attorney's fees incurred in the presuit mediation process.

(d) ~~(c) The department shall develop a certification and training program for private mediators and private arbitrators which shall emphasize experience and expertise in the area of the operation of community associations.~~ A mediator or arbitrator shall be certified to conduct mediation or arbitration under this section ~~by the department~~ only if he or she has been certified as a circuit court civil mediator or arbitrator, respectively, pursuant to the requirements established ~~attended at least 20 hours of training in mediation or arbitration, as appropriate, and only if the applicant has mediated or arbitrated at least 10 disputes involving community associations within 5 years prior to the date of the application, or has mediated or arbitrated 10 disputes in any area within 5 years prior to the date of application and has completed 20 hours of training in community association disputes. In order to be certified by the department, any mediator must also be certified~~ by the Florida Supreme Court. ~~The department may conduct the training and certification program within the department or may contract with an outside vendor to perform the training or certification. The expenses of~~

~~operating the training and certification and training program shall be paid by the moneys and filing fees generated by the arbitration of recall and election disputes and by the mediation of those disputes referred to in this subsection and by the training fees.~~

(e) ~~(d)~~ The presuit mediation procedures provided by this subsection may be used by a Florida corporation responsible for the operation of a community in which the voting members are parcel owners or their representatives, in which membership in the corporation is not a mandatory condition of parcel ownership, or which is not authorized to impose an assessment that may become a lien on the parcel.

~~(3) The department shall develop an education program to assist homeowners, associations, board members, and managers in understanding and increasing awareness of the operation of homeowners' associations pursuant to this chapter and in understanding the use of alternative dispute resolution techniques in resolving disputes between parcel owners and associations or between owners. Such education program may include the development of pamphlets and other written instructional guides, the holding of classes and meetings by department employees or outside vendors, as the department determines, and the creation and maintenance of a website containing instructional materials. The expenses of operating the education program shall be initially paid by the moneys and filing fees generated by the arbitration of recall and election disputes and by the mediation of those disputes referred to in this subsection.~~

Section 15. Except as otherwise expressly provided in this act, this act shall take effect July 1, 2006.

1073

1074 ================ T I T L E A M E N D M E N T ================

1075 Remove the entire title and insert:

1076 An act relating to community associations; creating s.

1077 712.11, F.S.; providing for the revival of certain

1078 declarations that have been extinguished; amending s.

1079 718.110, F.S.; revising provisions relating to the

1080 amendment of declarations; providing legislative findings

1081 and a finding of compelling state interest; providing

1082 criteria for consent to an amendment; requiring notice

1083 regarding proposed amendments to mortgagees; providing

1084 criteria for notification; amending s. 718.112, F.S.;

1085 revising implementation date for retrofitting of common

1086 areas with a sprinkler system; amending s. 718.114, F.S.;

1087 providing that certain leaseholds, memberships, or other

1088 possessory or use interests shall be considered a material

1089 alteration or substantial addition to certain real

1090 property; amending s. 718.404, F.S.; providing retroactive

1091 application of provisions relating to mixed-use

1092 condominiums; amending s. 720.302, F.S.; revising

1093 governing provisions relating to corporations that operate

1094 residential homeowners' associations; amending s. 720.303,

1095 F.S.; revising provisions relating to open meetings of the

1096 association; requiring the budget to provide for annual

1097 operating expenses; authorizing the budget to include

1098 reserve accounts for capital expenditures and deferred

1099 maintenance; providing the amount to be reserved;

1100 authorizing the association to adjust replacement reserve

1101 assessments annually; authorizing the developer to vote to

1102 waive the reserves or reduce the funding of reserves for a

1103 certain period; revising provisions relating to financial

reporting; revising time periods in which the association must complete its reporting; repealing s. 720.303(2), F.S., as amended, relating to board meetings, to remove conflicting versions of that subsection; creating s. 720.3035, F.S.; providing for architectural control covenants and parcel owner improvements; authorizing the review and approval of plans and specifications; providing limitations; providing rights and privileges for parcel owners as set forth in the declaration of covenants; amending s. 720.305, F.S.; providing that, where a member is entitled to collect attorney's fees against the association, the member may also recover additional amounts as determined by the court; amending s. 720.306, F.S.; providing that certain mergers or consolidations of an association shall not be considered a material or adverse alteration of the proportionate voting interest appurtenant to a parcel; revising provisions relating to items that members and parcel owners may address at membership meetings; amending s. 720.307, F.S.; requiring developers to deliver financial records to the board in any transition of association control to members; requiring certain information to be included in the records and for the records to be prepared in a specified manner; amending s. 720.308, F.S.; providing that a guarantee of common expenses shall be effective under certain circumstances; requiring the guarantee to meet certain requirements; authorizing the guarantee to provide certain requirements; requiring the stated dollar amount of the guarantee to be an exact dollar amount for each parcel identified in the declaration; providing payments required from the guarantor to be determined in a certain

manner; providing a formula to determine the guarantor's total financial obligation to the association; providing that certain expenses incurred in the production of certain revenues shall not be included in the common expenses; amending s. 720.311, F.S.; revising provisions relating to dispute resolution; providing that the filing of any petition for arbitration or the serving of an offer for presuit mediation shall toll the applicable statute of limitations; providing that certain disputes between an association and a parcel owner shall be subject to presuit mediation; revising provisions to conform; providing that temporary injunctive relief may be sought in certain disputes subject to presuit mediation; authorizing the court to refer the parties to mediation under certain circumstances; requiring the aggrieved party to serve on the responding party a written offer to participate in presuit mediation; providing a form for such offer; providing that service of the offer is effected by the sending of such an offer in a certain manner; providing that the prevailing party in any subsequent arbitration or litigation proceedings is entitled to seek recovery of all costs and attorney's fees incurred in the presuit mediation process; requiring the mediator or arbitrator to meet certain certification requirements; removing a requirement relating to development of an education program to increase awareness of the operation of homeowners' associations and the use of alternative dispute resolution techniques; providing effective dates.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. (1a)

Bill No. **HB 839 CS**

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Economic Development, Trade & Banking Committee

Representative(s) Kottkamp offered the following:

Amendment to Amendment (1) by Representative Kottkamp (with title amendments)

Insert between lines 12 and 13:

Section 2. Subsection (5) is added to section 718.106, Florida Statutes, to read:

718.106 Condominium parcels; appurtenances; possession and enjoyment.--

(5) A local ordinance or regulation may not establish any limitation on the ability of unit owners or an association to permit guests, licensees, members, or invitees to use or access their units or common elements for the purpose of accessing a public beach or private beach adjacent to the condominium.

========== T I T L E A M E N D M E N T ==========

On line 1078, after the semicolon insert:

Amending s.718.106, F.S.; prohibiting local ordinances that limit the access of certain persons to beaches that adjoin condominiums;

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. (1b)

Bill No. **HB 839 CS**

COUNCIL/COMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Council/Committee hearing bill: Economic Development, Trade & Banking Committee

Representative(s) Kottkamp offered the following:

Amendment to Amendment (1) by Representative Kottkamp (with title amendments)

Insert between lines 195 and 196:

Section 6. Present subsections (18) through (27) of section 719.103, Florida Statutes, are redesignated as subsections (19) through (28), respectively, and a new subsection (18) is added to that section, to read:

719.103 Definitions.--As used in this chapter:

(18) "Equity facilities club" means a club comprised of recreational facilities in which proprietary membership interests are sold to individuals, which membership interests entitle the individuals to use certain physical facilities owned by the equity club. Such physical facilities cannot include a residential unit or accommodation. For purposes of this definition, the term "accommodation" shall include, but is not limited to, any apartment, residential cooperative unit, residential condominium unit, cabin, lodge, hotel or motel room, or any other accommodation designed for overnight occupancy by one or more individuals.

Section 7. Section 719.507, Florida Statutes, is amended to read:

719.507 Zoning and building laws, ordinances, and regulations.--All laws, ordinances, and regulations concerning buildings or zoning shall be construed and applied with reference to the nature and use of such property, without regard to the form of ownership. No law, ordinance, or regulation shall establish any requirement concerning the use, location, placement, or construction of buildings or other improvements which are, or may thereafter be, subjected to the cooperative or equity facilities club form of ownership, unless such requirement shall be equally applicable to all buildings and improvements of the same kind not then, or thereafter to be, subjected to the cooperative or equity facilities club form of ownership. This section does not apply if the owner in fee of any land enters into and records a covenant that existing improvements or improvements to be constructed shall not be converted to the cooperative form of residential ownership prior to 5 years after the later of the date of the covenant or completion date of the improvements. Such covenant shall be entered into with the governing body of the municipality in which the land is located or, if the land is not located in a municipality, with the governing body of the county in which the land is located.

========== T I T L E A M E N D M E N T ==========

On line 1092, after the semicolon insert:
amending s. 719.103, F.S.; defining the term "equity facilities club"; amending s. 719.507, F.S.; prohibiting laws, ordinances, or regulations that apply only to improvements that are or may be subjected to an equity facilities club form of ownership;

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1553 Black Business Investment
SPONSOR(S): Carroll
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Economic Development, Trade & Banking Committee		Carlson	Carlson
2) Governmental Operations Committee			
3) Transportation & Economic Development Appropriations Committee			
4) Commerce Council			
5)			

SUMMARY ANALYSIS

The bill creates the Florida Black Business Investment Act, which is intended to increase the availability of capital to black business enterprises.

The bill includes the following provisions:

- Transfers oversight for the program from the Governor's Office of Tourism, Trade and Economic Development to the Office of Urban Opportunity within the Department of Community Affairs (DCA);
- Recreates the Florida Black Business Investment Board (BBIB) as an advisory body;
- Terminates current BBIB board members' terms and includes three representatives of Black Business Investment Corporations (BBIC) on the BBIB board;
- Requires the BBIB to advise DCA, to aid in the development and expansion of black business enterprises by leveraging state, local and private funds, to serve as an information and technical assistance clearinghouse, to market the program in the media and to collaborate with key state, local and education entities;
- Creates a Black Business Loan Program (BBLP) to provide loans and loan guarantees to black business enterprises through eligible recipients;
- Requires uniform rules and policies for the BBLP;
- Requires annual certification of program recipients, including BBICs;
- Provides eligibility criteria for black business enterprises;
- Requires detailed quarterly and annual reports on the program's performance;
- Requires OPPAGA to study the implementation of the bill and to perform a program review after one year;
- Requires the Auditor General to conduct an audit of BBIB investment activity; and
- Provides an appropriation to DCA.

The bill has an effective date of July 1, 2006.

The bill contains an unspecified appropriation.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Limited Government: The bill creates new oversight responsibilities and authorizes rulemaking for the Department of Community Affairs and creates new application, review and eligibility criteria for participants to the program. It also provides an unspecified appropriation.

Safeguard Individual Liberty: The bill should provide increased options for the owners of black business enterprises who seek access to capital.

B. EFFECT OF PROPOSED CHANGES:

Background:[1]

In the early 1980s, the Florida Legislature enacted a number of laws to encourage state agencies to contract with minority-owned businesses for goods and services.[2]

In March 1984, Governor Graham created the Governor's Advisory Council on Minority Enterprise Development to advise the Governor on matters affecting minority business enterprises and minority economic development.[3] The council's report identified "several impediments to black business development in Florida: limited access to capital, limited access to technical assistance, and limited access to business opportunities."[4] One recommendation of the council was that the state create a program to develop black-owned enterprises, providing both capital and management support.

Specifically, the council recommended that capital be provided to an authority governed by a board with substantial commercial or financial expertise, and that the authority should invest in "financial consortiums of regulated financial institutions designed to aid minority enterprises..."[5] In addition, the council stated that initial non-recurring needs for the authority are estimated at $15 million.[6]

In response to the council's report, the Legislature enacted the Florida Small and Minority Business Assistance Act.[7] This act found that there were economic disparities between blacks and other minorities and the general population caused primarily by "the vestiges of racial discrimination" and that

> "assisting qualified blacks in obtaining adequate capital and management skills for business ventures, as well as eradicating existing market barriers, are essential elements of a strategy to advance business development among black Floridians."[8]

This act created various mechanisms to assist small and minority businesses, including creation of the Florida Black Business Investment Board (FBBIB).[9] The act found that the public interest was served by:

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[1] The background information for this analysis is taken from the Senate Committee on Commerce and Consumer Services Interim Project Report No. 2006-105, "Review of the Florida Black Business Investment Board and Black Business Investment Corporations."

[2] Chapters 82-196, 83-3, and 83-333, L.O.F.

[3] Executive Order 84-58.

[4] June 17, 2005; http://www.fbbib.com/about/history.htm

[5] pp. 33-34, *Initial Report of the Governor's Advisory Council on Minority Enterprise Development* (Draft), December, 1984.

[6] pp. 38, *Initial Report of the Governor's Advisory Council on Minority Enterprise Development* (Draft), December, 1984.

[7] Ch. 85-104, L.O.F., which became Part IV, ch. 288, F.S., and reenacted by s. 28, ch. 94-322, L.O.F.

[8] Preamble, ch. 85-104, L.O.F.

[9] Additional mechanisms created by this act include establishing a Small and Minority Business Advisory Council within the Department of Commerce; requiring state agencies to consider the impact of proposed rules on Florida small and minority businesses;

- Increasing opportunities for employment of blacks, as well as the population in general;
- Providing role models and establishing business networks for the benefit of future generations of aspiring black entrepreneurs; and
- Strengthening the economy of the state by increasing the number of qualified black business enterprises and improving the welfare of economically depressed neighborhoods.[10]

This finding was later expanded to include:

- Establishing a partnership between the public and private sector to leverage state funds resources from the private sector;[11] and
- Taking measures to increase access of black businesses to both debt and equity capital.[12]

In addition to establishing the FBBIB, the Legislature appropriated $4,950,000 through a capitalization program to invest in regional Black Business Investment Corporations (BBICs), which are defined as not-for-profit subsidiaries of financial institutions or a consortium of financial institutions investing in or lending to black business enterprises.[13]

The Florida Black Business Investment Board

Initially created within the Florida Department of Commerce, the FBBIB now contracts with OTTED to promote the creation and growth of black business enterprises.[14] The board consisted of the following members:[15]

- Six members appointed by the Governor and subject to confirmation by the Senate, who must be experienced in investment finance and business development;
- One member each from the private sector appointed by the President of the Senate and the Speaker of the House of Representatives, who must be experienced in investment finance and business development;
- Three representatives of BBICs, who must be selected from among and by the chairs of the BBICs;
- The vice chair of Enterprise Florida, Inc., or his or her designee, as an ex officio, nonvoting member; and
- The chair of the Florida Development Finance Corporation, as an ex officio, nonvoting member of the board.

The board is also authorized to appoint two at-large members to the board from the private sector, each of whom may serve a 1-year term. However, such members may not serve on an executive committee.[16]

One member of the board is appointed by the Governor as the chairperson of the board, and serves at the pleasure of the Governor. The board is required to meet at least four times each year, upon the call of the chair or the vice chair or at the request of a majority of the membership. Board members serve

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required the Division of Purchasing within the Department of General Services (DGS) to establish a system to record and measure the use of minority business enterprises in state contracting; requiring DGS to certify minority business enterprises; authorizing state agencies to reserve contracts for competitive bidding to minority business enterprises; and establishing the Minority Business Enterprise Assistance Office within DGS.

[10] Section 9, ch. 85-104, L.O.F., which became s. 288.704, F.S.

[11] Section 1 of ch. 2002-180, L.O.F.

[12] Section 47, ch. 99-251, L.O.F.

[13] Section 9 of ch. 85-104, L.O.F., which became s. 288.707(2)(b), F.S.

[14] A "black business enterprise" is defined as a business that is at least 51 percent owned by Black Americans and managed and controlled by such persons. Section 288.707(2)(a), F.S.

[15] Section 288.707(3)(a), F.S.

[16] Section 288.707(3)(h), F.S.

without compensation, but members, the president of the board, and other board employees may be reimbursed for all reasonable, necessary, and actual expenses as determined by the board.[17]

The FBBIB is authorized to appoint a president to be the chief administrative and operational officer of the board to direct and supervise the administrative affairs and general management of the FBBIB. The board "may delegate to its president those powers and responsibilities it deems appropriate, except for appointment of the president."[18] The board is authorized to adopt bylaws for the regulation of its affairs and the conduct of its business and adopt policies to implement the provisions of law conferring duties upon it.[19]

Over the past twenty years, the mission of the FBBIB has evolved. Initially, the FBBIB served "as a catalyst for the development of competitive black-owned businesses in Florida."[20] Today, the FBBIB has expanded its "base of activities and services to include other minorities in order to connect diverse communities and grow the network of business partnerships and alliances."[21] The board also retains its historical commitment to serve the needs of the black-business community.[22]

FBBIB/BBIC Capitalization Program

The capitalization program is the legislative mechanism for appropriating funds to be invested in the regional BBICs and the FBBSC, a subsidiary of the FBBIB, which is the statewide BBIC. Capitalization program funds are appropriated to the FBBIB through OTTED. Unless otherwise specified in the General Appropriations Act proviso, the FBBIB has the discretion to allocate the funds to the regional BBICs, under the conditions specified by contract.

As it relates to the capitalization program, the duties of the FBBIB include:[23]

- Establish certification criteria for BBICs and certify at least once every 5 years, each of the BBICs. Certification criteria must include administrative capacity, fiduciary controls, and, in the case of existing black business investment corporations, solvency and soundness of prior loan decisions;
- Ensure that any appropriations by the Legislature to the FBBIB on behalf of the BBICs are provided in the manner and amount prescribed by the Legislature;
- Include in the criteria for loan decisions, occupational forecasting results which target high growth jobs;[24]
- Facilitate the formation of BBICs in under-served communities and establish in these areas memoranda of understanding with local financial institutions that will provide loan guarantees for loans to black business enterprises;[25]
- Annually, prepare a report detailing the performance of each BBIC, addressing the number of jobs created and/or retained, success and failure rates among loan recipients, and the amount of funds leveraged from other sources;[26] and

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[17] Section 288.707(3), F.S.
[18] Section 288.708(1), F.S.
[19] Section 288.709(1), F.S.
[20] Page 1, 2003 Annual Report of the FBBIB.
[21] Page 1, 2003 Annual Report of the FBBIB. In 2002, the Legislature required the FBBIB to study the feasibility of including other minority business enterprises within the programs, services, and activities of the FBBIB and the regional BBICs. Section 11, ch. 2002-180, L.O.F. Over the past two years, the FBBIB has expanded services to other minorities through a strategic partnership with the Florida State Hispanic Chamber of Commerce – Access Florida, the Preferred Lender Financing Program (pilot), and its purchase of a controlling interest in Indigo Key, Inc.
[22] The 2002 FBBIB resolution to expand services to other minorities reiterated this commitment. October 24, 2002 FBBIB Minutes.
[23] Section 288.7091, F.S.
[24] As established by the Workforce Estimating Conference. See s. 216.136(9), F.S.
[25] FBBIB staff reports that the FBBIB Support Corporation, a subsidiary of FBBIB that operates as a state-wide BBIC, serves rural counties that are not served by regional BBICs and, statewide, provides franchise lending and other financing that the regional BBICs are incapable of providing.

- Annually, provide for a financial audit of its accounts and records by an independent certified public accountant.

FBBIB certification criteria, application and allocation process for capitalization program funds, and minimum contract specifications with the BBICs are set forth in ch. 8K-2, F.A.C., which, subsequent to the dissolution of the Department of Commerce, has been adopted as policy by the FBBIB.[27]

Since 1985, the Legislature has appropriated $9.2 million in operating funds to FBBIB.[28] Over this same period, $18.6 million has been appropriated through the capitalization program, $10.85 million of which has been distributed to regional BBICs.

The FBBIB has additional obligations through an annual contract with OTTED.[29] The FBBIB must provide an annual report and a Quarterly Performance Measure Report that contains details of the performance of each BBIC and all other performance criteria required by the contract. These measures include:

- Number of jobs created or retained by regional and statewide BBICs;
- Dollar amount and procurement opportunities generated for black businesses;
- Matching dollars leveraged by the FBBIB; and
- Number of businesses provided assistance through the statewide BBIC.

Black Business and Investment Corporations

Since 1985, the eight regional BBICs have worked independently and in concert with the FBBIB to advance business development among black Floridians. The BBICs are not-for-profit subsidiaries of financial institutions or consortia of financial institutions investing in or lending to black business enterprises.[30] BBICs provide loans, loan guarantees, and technical assistance to black business enterprises.[31] They are each governed by a board of directors consisting of representatives of participating financial institutions, local governments, and other members of the community.

Pursuant to contracts, the FBBIB has a non-voting investment interest in all of the regional BBICs.[32] This interest was established, and is periodically expanded, through the purchase of membership certificates, with state appropriated capitalization program funds. This purchase is conditioned upon matching investments made by local financial institutions, and the provision of technical assistance and loans or loan guarantees to local black businesses in the counties served by the BBICs, as provided by contract.

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[26] The annual report is compiled from information submitted by the regional BBICs. Section 288.714, F.S., created by the 1985 act, also requires the FBBIB to submit an annual report to the Governor and Legislature on the operation and accomplishments of the FBBIB, "including the specified outcome measures reporting the results of the service efforts of entities involved in accomplishing board goals and objectives." See page 33, Report No. 12393, State of Florida, Office of the Auditor General.

[27] The substance of the ch. 8K-2, F.A.C., was last adopted as recertification criteria on June 29, 2004. FBBIB staff indicate that subsequent to the dissolution of the Department of Commerce in 1996, the FBBIB continued to rely on the provisions of the rule to guide FBBIB policy. This rule was also adopted by reference in the 1995 version of the contract between the FBBIB and the regional BBICs. However, it was not referenced in the 2002 version of the contract.

[28] The latest annual appropriation for operations was $451,210. Specific Appropriation 2496, ch. 2005-70, L.O.F. Section 288.7092(4)(a), F.S., provides that the state's operation investment in the FBBIB is the budget contracted by OTTED, "less funding that is directed by the Legislature to be subcontracted to a specific recipient."

[29] 2005 contract between OTTED and the FBBIB. Also see s. 288.7092(6), F.S., which requires the FBBIB to "comply with the performance measures, standards, and sanctions in its contracts" with OTTED.

[30] Section 288.707(2)(b), F.S. Until 2003, the Metro-Broward BBIC was a for-profit corporation.

[31] Some of the BBICs also provide additional economic development related services to their communities.

[32] These contracts are also referred to as "Membership Agreements."

The only duty of the BBICs prescribed in the Florida Statutes is that they coordinate with Enterprise Florida, Inc., and OTTED to avoid duplication and to develop local business and the necessary infrastructure to support each BBIC.[33]

BBICs are accountable to their respective boards and to the FBBIB by contract. In addition, four BBICs are certified as Community Development Financial Institutions (CDFIs) by the US Department of the Treasury.[34]

State capitalization funding to the BBICs is provided through contracts with the FBBIB.[35] These contracts require the BBICs to:

- Repay to the FBBIB a pro-rata share of all capital, not to exceed the aggregate contribution, upon dissolution of the corporation;
- Maintain books, records, documents and other evidence according to Generally Accepted Accounting Principles (GAAP), procedures and practices which "sufficiently and properly" reflect all costs of any nature expended in the performance of the contract and all investments, loans, or loan guarantees made with proceeds from the capitalization program funds;
- Make available for inspection by the FBBIB all records and accounts of the BBICs relating in any manner to the FBBIB's contribution or the contract;
- Establish procedures and maintain records, documents, and other evidence to demonstrate that the businesses assisted meet the requirements of law for financial assistance from the corporation (standards set forth in s. 288.71, F.S.);
- Report to the FBBIB at each quarter and annually its operations and accomplishments which must include the number of black business enterprises which have participated in the BBICs programs, the status of back enterprises, and the total number of jobs; and
- Offer products and services to businesses in surrounding areas.[36]

Major Legislative Changes

In an effort to improve program accountability and address emerging issues, since 1994 the Legislature has made changes to the provisions governing the FBBIB, with implications for the BBICs and the capitalization program.

In 1993, the Legislature created the Florida Commission on Minority Economic and Business Development to affirm the purpose, accomplishments, and benefits of the Florida Small and Minority Business Assistance Act, and to recommend measures to increase the number of minority businesses and to ensure the "integrity, competency, and efficiency in the administration of ...business development services..."[37] In response to commission recommendations, the 1994 Legislature abrogated the scheduled repeal of the program, [38] thereby maintaining the provisions in the act.[39] The Legislature also created a new statutory section to set forth specific duties of the FBBIB, including:[40]

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[33] Section 288.7095, F.S.

[34] The four BBICs are Metro Broward Capital Corporation, BAC Funding Consortium, Inc., BBIF of Central Florida, and Tampa Bay BBIC. (http://www.cdfifund.gov/docs/certification/cdfi/CDFI-state.pdf)
CDFI certification is important because it provides access to financial and technical assistance from the program. To date, three BBICs have received funding: Tampa Bay BBIC ($47,600, 1999); BAC ($1m, 1999); and Metro-Broward ($200,000, 2001). CDFI certification is also important because it attracts financial investments from banks, as they can obtain CRA credit that may not be available to them if they invest in non-CDFI certified institutions.

[35] Between 1985 and early 2002, $9,150,000 in Capitalization Program funds have been distributed to BBICs for investment in local black business enterprises.

[36] These are as specified in the 2002 version of the contract between the FBBIB and the regional BBICs.

[37] Section 1 of ch. 93-290, L.O.F.

[38] Section 32 of ch. 85-104, L.O.F. With the scheduled repeal of the act, there would also be no mechanism to continue monitoring or funding the regional BBICs.

- Establish certification criteria for the BBICs, encompassing such issues as administrative capacity, fiduciary controls, and, in the case of existing BBICs, solvency and soundness of prior loan decisions;[41]
- Establish, in communities that are not currently served by an existing BBIC, memoranda of understanding with local financial institutions that will provide loan guarantees for loans to black business enterprises;
- Annually, prepare a report detailing the performance of each BBIC, addressing the number of jobs created and/or retained, success and failure rates among loan recipients, and the amount of funds leveraged from other sources;[42] and
- Adopt rules that prescribe criteria used by the board to evaluate applications for financial assistance to black business enterprises.[43]

In 1996, the Legislature abolished the Department of Commerce and created OTTED within the Executive Office of the Governor to assume many of the department's responsibilities, including oversight of the FBBIB.[44] The Legislature also changed the composition of the FBBIB to require that at least one member of the FBBIB be a member of a BBIC.[45] In addition, the statute was amended to require that any proposed rules affecting the operation or administration of financial well being of any of the BBICs must first be approved by a majority of the BBICs.[46]

In 2002, the Legislature substantially amended provisions relating to the FBBIB by establishing the board as a not-for-profit corporation in public/private partnership with the state. The membership appointment process was diversified and expanded to include three board chairs of regional BBICs and the vice chair of Enterprise Florida, Inc. The law provided criteria to measure Florida's return on investment from activities of the board. The law required the board to seek private sector support that will equal the state's support by July 1, 2007, and prescribed items constituting private sector support.[47] Additionally, board responsibilities were expanded to include:

- Facilitating the formation of BBICs in communities not currently served by such corporations;
- Ensuring that any appropriations by the Legislature to FBBIB on behalf of the BBICs are provided to FBBIB in the manner and amount prescribed by the Legislature;
- Providing for an annual financial audit report of its accounts and records to be conducted by an independent certified public accountant;
- Complying with the performance measures, standards, and sanctions in its contract with OTTED; and
- Reporting to the Governor, the President of the Senate, and the Speaker of the House of Representatives by February 1, 2003, on the feasibility of including all minority business enterprises within the scope of its duties.[48]

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[39] Section 28 of ch. 94-322, L.O.F. Also see recommendations from the Florida Commission on Minority Economic and Business Development, "Final Report", February 1994, and the House of Representatives Committee on Tourism and Economic Development, as presented in their "Report on Florida's Small and Minority Business Assistance Act," February 1994.

[40] Chapter 94-271, L.O.F.

[41] In 1995, the FBBIB's rule, Chapter 8K-2, F.A.C., was amended to include certification criteria.

[42] Some of these performance requirements were also required, indirectly, in s. 288.714, F.S., and pursuant to the contracts between the FBBIB and the regional BBICs. In 1993 and 1994, audits by the Office of the Auditor General criticized the quality of the reporting by the BBICs to the FBBIB. See Reports No. 12066 and 12393, State of Florida, Office of the Auditor General.

[43] See ch. 8K-2, F.A.C.

[44] ch. 96-320, L.O.F.

[45] Section 64 of ch. 96-320, L.O.F.

[46] Section 65 of ch. 96-320, L.O.F. This provision was repealed by ch. 2003-268, L.O.F.

[47] Chapter 2002-180, L.O.F.

[48] In response to this requirement, the FBBIB contracted with KPMG to conduct the feasibility study. In response to the study, the FBBIB expanded services to the minority community through a strategic partnership with the Florida State Hispanic Chamber of Commerce – Access Florida, the Preferred Lender Financing Program (pilot), and its purchase of a controlling interest in Indigo Key, Inc.

In 2003, the Legislature removed the requirement that bylaws of policies affecting the BBICs be approved by the majority of the BBICs, and required BBICs to be certified by the FBBIB every 5 years.[49]

Governor's Chief Inspector General's Audit of the FBBIB/BBIC

In 2002, the FBBIB requested that the Office of Chief Inspector General (IG) conduct an audit of the FBBIB/BBICs to "assess the overall effectiveness and efficiency of the FBBIB and the BBICs operations and to determine whether the organizations were operating in accordance with the purposes for which they were statutorily created."[50]

In October 2003, the IG issued its audit revealing "a breakdown in accountability" and finding that the BBICs were not meeting program objectives.[51]

Audit findings included, in part, that:

- The organizational structure of the FBBIB and BBICs should be restructured to provide more effective and efficient delivery of services;
- The BBICs performance measurement data was not reliable, properly collected, documented, verified, and reported;
- BBIC loan and loan guarantee portfolios could not be accurately determined and loan files frequently did not contain adequate documentation; and
- The FBBIB and BBICs did not adequately monitor sub-recipient auditing and reporting activities.

Recertification of BBICs

In 1994, the Legislature mandated that the FBBIB establish certification criteria for BBICs.[52] The criteria must include "administrative capacity, fiduciary controls, and, in the case of existing Black Business Investment Corporations, solvency and soundness of prior loan decisions."[53] In 2003, this section was amended to require the FBBIB to certify each BBIC at least every 5 years.[54]

In 2003, the annual contract between the FBBIB and OTTED contained the following provision:

Pursuant to the terms of the Contract and, in particular, the terms of Article 5, FBBIB agrees to assist in the creation and growth of black business enterprises and in furtherance of such role agrees to ... establishment of the criteria for BBIC certification and recertification and initiation of the process mandated in Section 288.7091(1), Florida Statutes.[55]

In response, the FBBIB formed a special task force to develop recertification criteria[56] and review each of the regional BBICs to determine whether to recommend each BBIC for statutory recertification.[57]

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[49] Chapter 2003-268, L.O.F.
[50] *Current Issues Related to the Florida Black Business Investment Board*, FBBIB, January, 2005.
[51] Audit Number 2003-1, *Florida Black Business Investment Board/Black Business Investment Corporations Audit*, October 13, 2003. Executive Office of the Governor, Office of the Inspector General.
[52] Section 1, ch. 94-271, L.O.F In 1995, the FBBIB's rule, ch. 8K-2, F.A.C., was amended to include certification criteria.
[53] Section 288.7091(1), F.S.
[54] Section 3, ch. 2003-268, L.O.F. Arguably, this provision requires recertification of all BBICs under contract with the FBBIB by 2008. Also, rule 8K-2.009(3). F.A.C., was amended in 1995 to require BBICs to "seek and receive recertification every five years for as long as the Board has an investment in the corporation."
[55] Exhibit A to the Funding and Program Agreement, STATEMENT OF WORK, 2003/2004 Funding and Program Agreement between the FBBIB and OTTED, July 1, 2003.
[56] *Current Issues Related to the Florida Black Business Investment Board*, FBBIB, January, 2005.
[57] Also see FBBIB minutes for 2/5/04. It should be noted that the FBBIB's Statewide Investment Corporation was not made subject to recertification.

Additional documents state that the task force was formed to address "both legislative mandates and problems discovered in the IG audit." [58]

The task force, which included accountants, bankers, economic developers, consultants, and an FBBIB member, met three times in March and April of 2004. The task force was provided a mission and goals statement to guide them in developing the recertification criteria. The mission of the task force was to evaluate each BBIC and "determine the ability of each of them to receive additional investments" from the FBBIB. In establishing the criteria, the task force was instructed to consider:

- The administrative capacity, fiduciary controls, financial solvency and soundness of prior loan decisions as outlined in ss. 288.7091(1), F.S.;
- Chapter 8K-2, Florida Administrative Code;
- The October 2003 audit findings and recommendations of the Office of the Chief Inspector General;
- The contract terms and conditions between the FBBIB and the BBICs; and
- The expanded mission of the FBBIB to serve other minorities.[59]

On June 29, 2004, the FBBIB adopted the task force recertification criteria and set a timeline for the recertification process with a deadline of July 31, 2004.[60]

The task force met on December 7, 2004, to review the applications and provided the following recommendation to FBBIB:

> At the December 2004 Task Force meeting the quality of the applications submitted was discussed. The Task Force resolved that based on the recertification application and supporting documents submitted by the BBICs and reviewed and evaluated by the Task Force against the recertification criteria and other related considerations, it was unanimously recommended that the Board of Directors of FBBIB not to recertify any of the eight BBICs. FBBIB subsequently informed each of the BBIC presidents and the FBBIB Board of the Task Force's action.[61]

Persistence of Disparity

Although the number of black-owned firms continues to increase, and in fact grow at a faster rate than all other businesses in Florida, the disparity between the proportion of black-owned and non-black-owned businesses persists. The chart below illustrates this disparity by comparing the percentage of total firms in Florida that are owned by blacks and the percentage of Florida's population that is black. While blacks historically make up around 14-15 percent of Florida's population, they own only between 3.5 percent and 4.5 percent of the businesses in Florida. The magnitude of the disparity has remained approximately the same since 1987.

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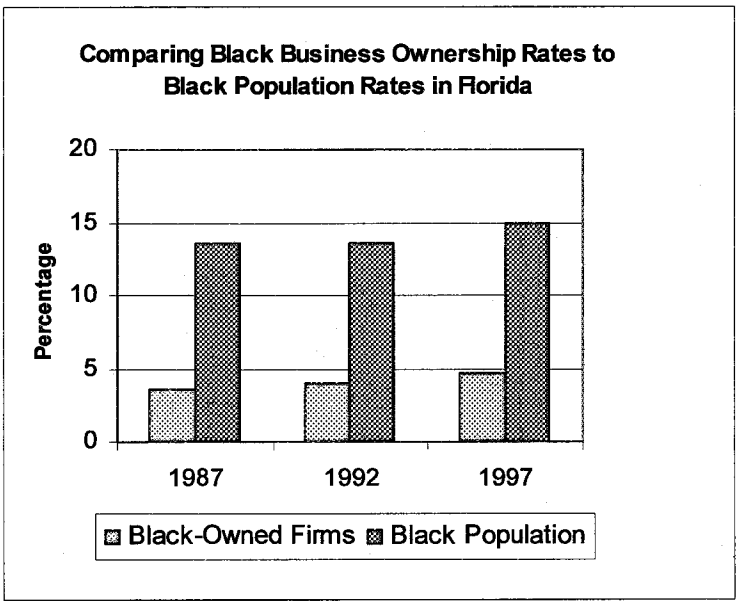
[58] *Current Issues Related to the Florida Black Business Investment Board,* FBBIB, January, 2005. Additionally, in their response to the IG Report, the FBBIB stated that they would pursue recertification of the BBICs in response to the IG's finding that the organizational structure of the FBBIB and regional BBICs should be restructured to provide more effective and efficient delivery of services.

[59] *Recertification Task Force Mission and Goals,* FBBIB, March 23, 2004.

[60] FBBIB Minutes, June 29, 2004, and e-mail from Hilmon Sorey to BBICs Presidents, July 1, 2004.

[61] Memo from James Carras, Consultant to FBBIB Recertification Task Force, to Hilmon Sorey, dated July 15, 2005, regarding FBBIB Recertification Process. A recording from the task force meeting indicates that the "other considerations" were the BBICs efforts to terminate or amend their contractual relationship with the FBBIB.



Source: U.S. Census Bureau

Effect of Proposed Changes:

Office of Urban Opportunity

The bill expands the power of the Office of Urban Opportunity (OUO) within the Department of Community Affairs (DCA) to include managing the Black Business Loan Program (BBLP).

Black Business Investment Board

It revises the mission of the Florida Black Business Investment Board (FBBIB) to assist in the development and expansion of black business enterprises (BBE) by advising the Department of Community Affairs in its oversight of the Black Business Loan Program; evaluating the amount of unmet need for capital by BBEs in Florida; creating partnerships with state and local governments and private enterprise; and providing a network of information resources and technical assistance for BBEs.

The bill revises the membership requirements for the FBBIB to include three members who represent Black Business Investment Corporations (BBIC) and requires all members to have business or related experience. Importantly, the bill terminates existing board memberships and requires appointment of new members by October 1, 2007.

The bill revises the powers of the FBBIB to be consistent with its limited advisory mission.

The bill revises the duties of the FBBIB to require it to serve as an advisory board to DCA by contract with the department; to leverage state, local and private funds to benefit the program consistent with law; to serve as the clearinghouse for information and technical assistance; to market the BBLP; to collaborate with key state, local and education entities; to develop strategies to increase financial institution investment in BBEs and to provide a 5 year projection of the need for capital, through contract with a third party, once every 5 years.

Black Business Investment Corporations

The bill restates the current legal definition of a BBIC and gives BBICs that meet the eligibility provisions of the revised laws priority consideration for participation in the BBLP.

Black Business Loan Program

The bill creates the BBLP within DCA and requires DCA to provide loans and loan guarantees, through eligible recipients such as BBICs or others, to BBEs that cannot otherwise obtain capital through conventional lending institutions but who could otherwise compete successfully in the private sector. The bill requires DCA to promulgate rules; to establish an open, competitive and uniform application and annual certification process; and to develop an equitable allocation policy. The bill requires FBBIB and BBICs to adopt uniform underwriting guidelines and interest rates.

The bill authorizes the use of state funds, up to 7 percent of funds received by an eligible recipient, for administrative expenses directly related to state accountability requirements, so that recipients can cover costs of such requirements.

The bill provides eligibility requirements for potential program recipients, including BBICs, that seek to provide loans or loan guarantees under the BBLP. A recipient must be a Florida non-profit corporation and have the experience and capacity to provide services under the program. A recipient must agree to meet all statutory requirements and demonstrate that it can provide a private match of 75 percent of state funds it receives.

Each recipient must be certified by DCA each year as meeting the requirements of law and applicable contracts. No recipient may receive funds absent such annual certification.

Black Business Enterprise Eligibility

The bill requires that a BBE demonstrate the any proposed loan or loan guarantee is economically sound and will assist it in entering the conventional lending market, increasing opportunities for employment in Florida and strengthening the state's economy. In addition, the BBE must demonstrate that it can compete successfully in the private sector and has or will obtain approved technical or managerial support.

Black Business Loan Program Trust Fund

The bill revises the existing Black Business Investment Incentive Trust Fund created by s. 288.711, F.S., as the Black Business Loan Program Trust Fund under DCA.

Quarterly and Annual Reports

The bill revises reporting requirements for recipients of funds, including BBICs, the FBBIB and the Department, consistent with their duties, eligibility requirements and program goals, to provide unambiguous information on a quarterly basis (to DCA) and an annual basis (from DCA to the Governor, Senate and House of Representatives) regarding the program's performance.

OPPAGA and Auditor General Reports

The bill requires The Office of Program Analysis and Government Accountability (OPPAGA) to conduct an interim implementation review of the implementation of the bill's provisions, with a report due December 1, 2007, and a full program review, with a report due December 1, 2008. Each report will be provided to the Governor, President of the Senate and Speaker of the House of Representatives.

It also requires the Auditor General to audit the investments made by the FBBIB for the period 2001-2002 through 2005-2006 and report to the Governor, President of the Senate and Speaker of the House of Representatives by January 1, 2007.

Repeals

The bill repeals ss. 288.7092 (return on investment by FBBIB), 288.7095 (duties of BBICs), 288.71 (conditions for FBBIB action), 288.7101 (FBBIB state employee leasing program), 288.712 (guarantor of funds provisions), and 288.713 (capital participation instruments), F.S.

Appropriation

The bill provides for an appropriation to DCA for implementation of the act and for personnel costs at an approved salary rate. The amount of the appropriation and salary rate have not been determined to date.

C. SECTION DIRECTORY:

Section 1. Amends s. 288.702, F.S., to revise a title.

Section 2. Amends s. 20.18, F.S., to include the Black Business Loan Program within the Office of Urban Opportunity of the Department of Community Affairs.

Section 3. Amends s. 288.706, F.S., to require collaboration between the Department of Management Services, the BBIB and the Department of Community Affairs.

Section 4. Creates s. 288.7065, F.S., to provide a short title.

Section 5. Substantially amends s. 288.707, F.S., relating to the creation of the FBBIB, board membership, meetings, financial disclosure and to terminate existing board memberships.

Section 6. Amends s. 288.708, F.S., to remove redundant language.

Section 7. Amends s. 288.709, F.S., to revise the powers of the FBBIB consistent with its advisory mission.

Section 8. Substantially amends s. 288.7091, F.S., to revise the duties of the FBBIB consistent with its advisory mission.

Section 9. Creates s. 288.710, F.S., to define a "Black Business Investment Corporation" and to give the corporations priority consideration for participation in the Black Business Loan Program.

Section 10. Creates s. 288.7102, F.S., creating the Black Business Loan Program within the Department of Community Affairs. Requires the Department, FBBIB and BBICs to establish application and review processes, uniform loan policies and other criteria for the program. Sets eligibility requirements for program recipients. Requires the Department to annually certify each program participant as eligible to continue in the program and to adopt rules to implement the law.

Section 11. Creates s. 288.7103, F.S., to set eligibility requirements that black business enterprises must meet to qualify for a loan or loan guarantee.

Section 12. Amends s. 288.711, F.S., to revise the Black Business Incentive Trust Fund and place it within the Department of Community Affairs.

Section 13. Substantially amends s. 288.714, F.S., to conform reporting requirements to the new duties imposed by the bill on program participants and the Department of Community Affairs.

Section 14. Amends. s. 288.9015, F.S., to require Enterprise Florida, Inc., to collaborate with the FBBIB and Department of Community Affairs.

Section 15. Requires the Office of Program Policy Analysis and Government Accountability to conduct a review of the initial implementation of the bill and a full program review and make reports.

Section 16. Requires the Auditor General to conduct an audit of the FBBIB's investment activity and make a report.

Section 17. Repeals ss. 288.7092, 288.7095, 288.71, 288.7101, 288.712, and 288.713, F.S.

Section 18. Provides an appropriation and approved salary rate for staff to the Department of Community Affairs.

Section 19. Provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: None.

2. Expenditures: The bill will require an appropriation to the Department of Community Affairs under its new authority. The Department has not estimated the cost and staffing needs associated with the bill to date.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: None.

2. Expenditures: None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: The bill should result in additional capital investments in black business enterprises in Florida.

D. FISCAL COMMENTS: None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require a municipality or county to expend funds or to take any action requiring the

expenditure of funds. The bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate. The bill does not reduce the percentage of state tax shared with municipalities or counties.

2. Other:

Creation of Trust Fund

The bill revises the Black Business Investment Incentive Trust Fund as the Black Business Loan Program Trust Fund within the Department of Community Affairs to implement the provisions of the Black Business Loan Program. It may be creating a new trust fund in the bill, which is prohibited by s. 19 of art. III of the State Constitution. The creation of a new trust fund must be in a separate bill and be passed by a three-fifths vote of the House.

Racial Discrimination

The law expressly classifies the ultimate program recipients on the basis of race, limiting program benefits to black business enterprises. Such a racial classification is suspect under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[62] A government classification based on race must be based on a compelling state interest and narrowly tailored to meet that interest to withstand strict scrutiny analysis.[63] A minority set-aside intended to remedy past or present discrimination is a compelling government interest but must be based on specific evidence of past discrimination to withstand constitutional scrutiny.[64]

B. RULE-MAKING AUTHORITY: The bill requires the Department of Community Affairs to promulgate rules to implement the bill's provisions.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

[62] See *City of Richmond v. J.A. Croson Co.*, 488. U.S. 469, 494-494 (1989).
[63] *Id.*
[64] See *Fla. A.G.C. Council, Inc., v. Florida*, 303 F.Supp.2d 1307, 1315 (N.D. Fla. 2004).

A bill to be entitled

An act relating to black business investment; amending s. 288.702, F.S.; revising a short title; amending s. 20.18, F.S.; revising a duty of the Department of Community Affairs; including as a purpose of the Office of Urban Opportunity in the Department of Community Affairs the administration of the Black Business Loan Program; amending s. 288.706, F.S.; deleting references to the Florida Black Business Investment Board, Inc., and black business investment corporations from a list of certain financial institutions maintained by the Department of Management Services; requiring the Department of Management Services to collaborate with the Florida Black Business Investment Board, Inc., and the Department of Community Affairs for certain purposes; creating s. 288.7065, F.S.; providing a short title; amending s. 288.707, F.S.; revising provisions creating the Florida Black Business Investment Board, Inc.; revising legislative findings; creating the board; requiring the board to contract with the Department of Community Affairs for certain purposes; specifying application of public records and public meetings requirements; providing for appointment of a board of directors; specifying terms of office and experience requirements of board members; providing for filling of board vacancies; authorizing the Governor to appoint a chair; providing for meetings; requiring members to serve without compensation; providing for reimbursement of expenses; requiring members to file

disclosure of financial interests; terminating existing board appointments and providing for new appointments; amending s. 288.708, F.S.; deleting a provision specifying prudent use of certain funds and requiring use of funds according to applicable laws, bylaws, or contracts; applying certain salary limitation provisions to employees of the board; amending s. 288.709, F.S.; revising the powers of the board; amending s. 288.7091, F.S.; revising the duties of the board; creating s. 288.710, F.S.; providing a definition; specifying eligibility of certain black business investment corporations to participate in the Black Business Loan Program; requiring the department to give priority consideration to such corporations for participation in the program; creating s. 288.7102, F.S.; establishing the Black Business Loan Program in the Department of Community Affairs; requiring the department to provide loans and loan guarantees under the program for certain purposes; providing duties and responsibilities of the department in administering the program; requiring the Florida Black Business Investment Board, Inc., and participating black business investment corporations to adopt uniform loan and loan guarantee underwriting policies and application criteria and to establish a minimum interest rate; providing for payment of certain administrative expenses through state funds; providing a limitation; requiring the department to develop a service allocation policy for certain purposes; providing loan recipient eligibility requirements; requiring annual

certification of eligibility; requiring the department to consult with the Florida Black Business Investment Board, Inc.; requiring the department to adopt rules; creating s. 288.7103, F.S.; providing black business enterprise eligibility requirements for receiving loans or loan guarantees; amending s. 288.711, F.S.; renaming the Florida Investment Incentive Trust Fund as the Florida Black Business Loan Program Trust Fund; placing the fund in the Department of Community Affairs for purposes of implementing and administering the Black Business Loan Program; deleting provisions relating to authorizations for the board to make investments from the fund for certain purposes; deleting certain intent and purposes provisions; amending s. 288.714, F.S.; requiring recipients to provide quarterly and annual reports; specifying report requirements; requiring the department to submit an annual program report to the Governor and Legislature; specifying report requirements; requiring the Florida Black Business Investment Board, Inc., and certain black business investment corporations to submit an annual report to the department on uses of certain state funds; specifying report requirements; amending s. 288.9015, F.S.; requiring Enterprise Florida, Inc., to collaborate with the Florida Black Business Investment Board, Inc., and the Department of Community Affairs for certain purposes; requiring the Office of Program Policy Analysis and Government Accountability to submit a status report to the Governor and Legislature on the department's

implementation of the Florida Black Business Investment Act; requiring the office to conduct a program review of the department; requiring the office to submit a program review report to the Governor and Legislature; requiring the Auditor General to conduct an audit of the Florida Black Business Investment Board, Inc.'s, investment activity for a certain time period; requiring the Auditor General to submit an audit report to the Governor and Legislature; repealing s. 288.7092, F.S., relating to return on investment from activities of the corporation; repealing s. 288.7095, F.S., relating to duties of black business investment corporations; repealing s. 288.71, F.S., relating to conditions for board action; repealing s. 288.7101, F.S., relating to the state employee leasing program of the Department of Management Services for employees of the Florida Black Business Investment Board, Inc.; repealing s. 288.712, F.S., relating to Florida guarantor funds; repealing s. 288.713, F.S., relating to capital participation instruments; providing an appropriation; authorizing certain positions and approved salary rates; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 288.702, Florida Statutes, is amended to read:

288.702 Short title.--This section and sections 288.703-288.706 ~~This act shall be known and~~ may be cited as the "Florida Small and Minority Business Assistance Act ~~of 1985~~."

Section 2. Paragraph (b) of subsection (4) and subsection (6) of section 20.18, Florida Statutes, are amended to read:

20.18 Department of Community Affairs.--There is created a Department of Community Affairs.

(4) In addition to its other powers, duties, and functions, the department shall, under the general supervision of the secretary and the Interdepartmental Coordinating Council on Community Services, assist and encourage the development of state programs by the various departments for the productive use of human resources, and the department shall work with other state agencies in order that together they might:

(b) Assist Enterprise Florida, Inc., ~~the Department of Commerce~~ in the development of employment opportunities; and

(6) The Office of Urban Opportunity is created within the Department of Community Affairs. The purpose of the office is to administer the Front Porch Florida initiative, a comprehensive, community-based urban core redevelopment program that enables urban core residents to craft solutions to the unique challenges of each designated community, and the Black Business Loan Program, the purpose of which is to leverage state, local, and private funds to provide loans and loan guarantees to black business enterprises that cannot obtain capital through conventional lending institutions but which otherwise could compete successfully in the private sector.

Section 3. Subsection (11) of section 288.706, Florida Statutes, is amended, and subsection (12) is added to that section, to read:

288.706 Florida Minority Business Loan Mobilization Program.--

(11) The Department of Management Services shall maintain a listing of financial institutions willing to participate in the Florida Minority Business Loan Mobilization Program~~, which may include the Florida Black Business Investment Board, Inc., and black business investment corporations~~. This list of financial institutions shall not be exclusive. A minority business enterprise vendor who has a working relationship with a financial institution is encouraged to request that the financial institution apply to participate as a financial institution for the program.

(12) The Department of Management Services shall collaborate with the Florida Black Business Investment Board, Inc., and the Department of Community Affairs to assist in the development and enhancement of black business enterprises.

Section 4. Section 288.7065, Florida Statutes, is created to read:

288.7065 Short title.--This section and sections 288.707-288.714 may be cited as the "Florida Black Business Investment Act."

Section 5. Section 288.707, Florida Statutes, is amended to read:

(Substantial rewording of section. See s. 288.707, F.S., for present text.)

288.707 Florida Black Business Investment Board, Inc.; findings; creation; membership; organization; meetings; disclosure.--

(1) The Legislature finds that the public interest of the state will be served by the creation of a nonprofit public-private entity the primary mission of which shall be to assist in the development and expansion of black business enterprises by:

(a) Advising the Department of Community Affairs in its oversight of the Black Business Loan Program and creating long-range strategic policy for the program.

(b) Evaluating the unmet need for capital by black business enterprises in the state.

(c) Creating partnerships between state and local governments and private enterprises to aid in the development and expansion of black business enterprises.

(d) Providing a network of information resources for black business enterprises and providing technical assistance through this network.

(2) There is created a not-for-profit corporation to be known as the Florida Black Business Investment Board, Inc., referred to in this section as the board, which shall be registered, incorporated, organized, and operated in compliance with chapter 617 and which shall not be a unit or entity of state government. The board shall contract with the Department of Community Affairs to implement the provisions of ss. 288.707-288.714. However, the Legislature determines that public policy dictates that the corporation operate in the most open and

accessible manner consistent with its public purpose. Therefore, the Legislature specifically declares that the board and its advisory committees or similar groups created by the board, including any subsidiaries, are subject to the provisions of chapter 119, relating to public records, and the provisions of chapter 286, relating to public meetings and records.

(3) The board shall be governed by a board of directors chosen as follows:

(a) Four members appointed by the Governor who shall serve terms of 4 years, except that in making initial appointments, the Governor shall appoint two members to serve for terms of 2 years and two members to serve for terms of 3 years.

(b) Two members appointed by the President of the Senate, who shall serve terms of 2 years.

(c) Two members appointed by the Speaker of the House of Representatives, who shall serve terms of 2 years.

(d) The vice chair of Enterprise Florida, Inc., or his or her designee, who shall be an ex officio, nonvoting member.

(e) Three members who are officers or directors of participating black business investment corporations, who shall be appointed by the Secretary of Community Affairs upon the recommendation of the Florida Consortium of Black Business Investment Corporations, Inc.

(4) Members of the board must have experience in business, including financial services, banking, or economic development.

(5) Any person appointed to fill a vacancy on the board shall be appointed in a like manner and shall serve for only the unexpired term. Any member shall be eligible for reappointment.

(6) The Governor shall appoint the chair, who shall be a member of the board and who shall serve at the pleasure of the Governor. The board shall annually elect one of its members as vice chair and one of its members as secretary-treasurer. The secretary-treasurer shall keep a record of the proceedings of the board and shall be the custodian of all books, documents, and papers filed with the board, the minutes of meetings of the board, and the board's official seal.

(7) The board shall meet at least four times annually upon the call of the chair or vice chair or at the request of a majority of the membership. A majority of the total number of current members of the board shall constitute a quorum. The board may take official action by a majority vote of the members present at any meeting at which a quorum is present.

(8) Members of the board shall serve without compensation, but members, the president of the corporation, and other board employees may be reimbursed for all reasonable, necessary, and actual expenses as determined by the board and approved by the department.

(9) Each member of the board who is not otherwise required to disclose financial interests pursuant to s. 8, Art. II of the State Constitution or s. 112.3144 shall file a statement of financial interests pursuant to s. 112.3145.

(10) Existing board terms shall expire on the effective date of this act and new members shall be appointed according to the terms of this act by October 1, 2007.

Section 6. Subsection (2) of section 288.708, Florida Statutes, is amended to read:

288.708 President; employees.--

(2) ~~The corporation and its officers and board members are responsible for the prudent use of all public and private funds and shall ensure that the use of such funds is in accordance with all applicable laws, bylaws, or contractual requirements.~~ An employee of the board ~~corporation~~ may not receive compensation for employment that exceeds the salary paid to the Governor, unless the board ~~corporation~~ and the employee have executed a contract that prescribes specific and measurable performance outcomes for the employee, the satisfaction of which provides the basis for the award of incentive payments that increase the employee's total compensation to a level above the salary paid to the Governor.

Section 7. Section 288.709, Florida Statutes, is amended to read:

288.709 Powers of the Florida Black Business Investment Board, Inc.--The board shall have all the powers granted under chapter 617 and any powers necessary or convenient to carry out and effectuate the purposes and provisions of ss. 288.707-288.714, including, but not limited to, the power to:

~~(1) Adopt bylaws for the regulation of its affairs and the conduct of its business and adopt policies to implement the provisions of law conferring duties upon it. Such bylaws shall provide that the corporation is subject to the requirements of s. 24, Art. I of the State Constitution and chapter 119 and s. 286.011.~~

~~(2) Adopt an official seal.~~

~~(3) Sue and be sued in its own name.~~

~~(4) Make and execute contracts and other instruments necessary or convenient for the exercise of its power and functions.~~

~~(5) Acquire, hold, and dispose of personal property for its corporate purposes.~~

(1) ~~(6)~~ Enter into agreements or other transactions with any federal, state, or local agency or private entity.

~~(7) Encourage financial institutions to participate in consortia for the purpose of investing in black business enterprises.~~

~~(8) Ensure that funds available to the board for purposes set forth in ss. 288.707-288.714 are disbursed on a statewide basis and are not concentrated in one geographical area.~~

(2) ~~(9)~~ Invest any funds held in reserves or sinking funds, or any funds not required for immediate disbursement, in such investments as may be authorized for trust funds under s. 215.47; however, such investments will be made on behalf of the board by the Chief Financial Officer or by another trustee appointed for that purpose.

~~(10) Appear in its own behalf before boards, commissions, departments, or other agencies of municipal, county, state, or Federal Government.~~

~~(11) Procure insurance or require bond against any loss in connection with its property in such amounts and from such insurers as may be necessary or desirable.~~

(3) ~~(12)~~ Apply for, accept, and disburse from any state or nonstate source ~~Receive and accept from any federal, state, or local agency~~ grants, loans, or advances for, or in aid of, the

purposes of ss. 288.707-288.714, and ~~to~~ receive and accept contributions from any source of either money, property, labor, or other things of value, to be held, used, and applied for said purposes.

~~(13) Create, issue, and buy and sell stock, evidences of indebtedness, and other capital participation instruments; to hold such stock, evidences of indebtedness, and capital participation instruments; and to underwrite the creation of a capital market for these securities in a manner designed to enhance development of capital ownership in the target group.~~

(4) ~~(14)~~ Provide and pay for such advisory services and technical assistance as may be necessary or desirable to carry out the purposes of this act, upon the approval of the department.

(5) ~~(15)~~ Engage in special programs to enhance the development of black business enterprises as authorized by this act and approved by the department.

~~(16) Promote black ownership of financial institutions in Florida.~~

~~(17) Take, hold, and improve property, including real property.~~

~~(18) Do any and all things necessary or convenient to carry out the purposes of, and exercise the powers given and granted in, ss. 288.707-288.714, and exercise any other powers, rights, or responsibilities of a corporation.~~

(6) ~~(19)~~ In addition to any indemnification available under chapter 617, indemnify, and purchase and maintain insurance on behalf of, directors, officers, and employees of the corporation

and its boards against any personal liability or accountability by reason of actions taken while acting within the scope of their authority.

(7) ~~(20)~~ Provide in its bylaws that, upon the dissolution of the corporation, all of its assets acquired through the use of state funds, after payment of all legal debts and liabilities, revert to this state.

Section 8. Section 288.7091, Florida Statutes, is amended to read:

(Substantial rewording of section. See s. 288.7091, F.S., for present text.)

288.7091 Duties of the Florida Black Business Investment Board, Inc.--The board shall:

(1) Serve as an advisory board to the Department of Community Affairs, through contract with the department, to assist the department with the implementation of ss. 288.707-288.714.

(2) Aid the development and expansion of black business enterprises by leveraging state, local, and private funds to be held by the department for use according to the provisions of ss. 288.707-288.714.

(3) Serve as the clearinghouse for information and sources of technical assistance that will enhance the development and expansion of black business enterprises and facilitate the provision of technical assistance in communities in which such services are otherwise unavailable.

(4) Aggressively market the Black Business Loan Program and related services to black business enterprises through all

appropriate media outlets, including media targeting the African-American community.

(5) Collaborate with Enterprise Florida, Inc., or its affiliates to develop and expand black business enterprises.

(6) Collaborate with the Department of Transportation, the Department of Management Services, including the Florida Minority Business Loan Mobilization Program, Workforce Florida, Inc., and other state agencies and partners, the State University System, including the Florida Agricultural and Mechanical University's Institute of Urban Policy and Commerce, school boards, and local governments to create a network of information and seek out available resources to enhance the development and expansion of black business enterprises.

(7) Develop strategies to increase financial institution investment in black business enterprises.

(8) Provide a 5-year projection of the need for capital by black business enterprises. The board shall contract with an independent entity to prepare the projection once every 5 years.

(9) Annually provide for a financial audit as defined in s. 11.45 of the board's accounts and records by an independent certified public accountant. The audit shall include an explanation of all investments made by the board and an explanation of administrative costs. Within 6 months after the end of the fiscal year, the audit report shall be provided to the Governor, the President of the Senate, the Speaker of the House of Representatives, and the Auditor General.

Section 9. Section 288.710, Florida Statutes, is created to read:

288.710 Black business investment corporations.--

(1) The term "black business investment corporation" means a subsidiary of a financial institution or a consortium of financial institutions incorporated as a nonprofit corporation to provide loans and loan guarantees to black business enterprises under ss. 288.707-288.714.

(2) A black business investment corporation that meets the requirements of s. 288.7102(7) is eligible to participate in the Black Business Loan Program and shall receive priority consideration by the department for participation in the program.

Section 10. Section 288.7102, Florida Statutes, is created to read:

288.7102 Black Business Loan Program.--The Black Business Loan Program is established in the Department of Community Affairs. Under the program, the department shall provide loans and loan guarantees, through eligible recipients, from the Florida Black Business Investment Incentive Trust Fund to black business enterprises who cannot obtain capital through conventional lending institutions but which could otherwise compete successfully in the private sector.

(1) The department shall establish a uniform, open, and competitive application and annual certification process for eligible recipients who seek funds to provide loans or loan guarantees to black business enterprises pursuant to the Florida Black Business Investment Act.

(2) The Florida Black Business Investment Board, Inc., and participating black business investment corporations shall adopt

uniform loan and loan guarantee underwriting policies, which must be approved by the department.

(3) The Florida Black Business Investment Board, Inc., and participating black business investment corporations shall establish a minimum interest rate for loans and loan guarantees to ensure that necessary loan administration costs are covered. The minimum interest rate must be approved by the department.

(4) The department shall adopt uniform criteria to be used by eligible recipients in evaluating and approving applications for loans or loan guarantees consistent with s. 288.7103.

(5) Administrative expenses directly related to state funds and accountability requirements incurred by an eligible recipient in providing assistance to a black business enterprise receiving a loan or loan guarantee may be paid out of state funds not to exceed 7 percent.

(6) The department shall develop an allocation policy to ensure that services provided under ss. 288.707-288.714 for the benefit of black business enterprises are disbursed equitably throughout the state.

(7) To be eligible to receive funds and provide loans or loan guarantees under this section, a recipient must:

(a) Be a corporation not for profit registered in the state.

(b) Demonstrate that its board of directors includes citizens of the state experienced in the development of black business enterprises.

(c) Demonstrate that the recipient has a business plan that will allow the recipient to operate consistent with ss. 288.707-288.714 and the rules of the department.

(d) Demonstrate that the recipient has the technical skills to analyze and evaluate applications by black business enterprises for loans or loan guarantees.

(e) Demonstrate that the recipient has established viable partnerships with public and private funding sources, economic development agencies, and workforce development and job referral networks.

(f) Demonstrate that the recipient can provide a private match equal to 75 percent of the amount of the loan or loan guarantee provided by the department.

(g) Agree to maintain the recipient's books and records relating to funds received by the department according to generally accepted accounting principles and to make such books and records available to the department for inspection upon reasonable notice.

(h) Agree to be subject to the provisions of chapter 119 relating to public records and the provisions of chapter 286 relating to public meetings, with respect to all state funds received by the eligible recipient from the department.

(8) The department shall annually certify each eligible recipient, who must meet the provisions of ss. 288.707-288.714, the terms of the contract between the recipient and the department, and any other applicable state or federal laws. An entity may not receive funds under ss. 288.707-288.714 unless the entity meets annual certification requirements.

(9) The department shall consult with the Florida Black Business Investment Board, Inc., in implementing the provisions of this section.

(10) The department shall adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this section.

Section 11. Section 288.7103, Florida Statutes, is created to read:

288.7103 Eligibility for loan or loan guarantee.--A black business enterprise is not eligible to receive a loan or loan guarantee unless the enterprise demonstrates that:

(1) The proposed loan or loan guarantee is economically sound and will assist the black business enterprise in entering the conventional lending market, increasing opportunities for employment, and strengthening the economy of the state.

(2) The enterprise will be able to compete successfully in the private sector if the enterprise obtains the requested financial assistance and has or will obtain appropriate and credible technical or managerial support through an organization approved by the corporation.

Section 12. Section 288.711, Florida Statutes, is amended to read:

288.711 Florida Black Business Investment ~~Incentive~~ Trust Fund.--

~~(1)~~ There is hereby created the Florida Black Business Loan Program ~~Investment Incentive~~ Trust Fund in the Department of Community Affairs for purposes of providing loans or loan guarantees under the Black Business Loan Program as provided in

s. 288.7102 ~~from which money may be drawn for investments or loans, as authorized by this section, to encourage the development of appropriate financial mechanisms in the private sector to capitalize and assist in the development of black business enterprises. All income earned by investments of the fund shall be deposited in the fund for carrying out the purposes of ss. 288.707-288.714~~. Administrative costs of the program shall be appropriated in a lump-sum appropriation from the fund created herein and shall be provided in the General Appropriations Act.

~~(2) The board is authorized to invest from the Florida Investment Incentive Trust Fund in black business investment corporations which conduct, or agree to conduct, programs of assisting the development of black business enterprises. Such investments shall be made under conditions required by law and as the board may, from time to time, require and may take any of the following forms:~~

~~(a) Purchases of stock, preferred or common, voting or nonvoting, as determined by the board;~~

~~(b) Loans, with or without recourse, in either a subordinated or priority position, as determined by the board; provided, however, that no more than 20 percent of the capital base may be used for direct loans to black business enterprises; or~~

~~(c) Any other investment authorized by the board based on the expertise of its members.~~

~~(3) It is the intent of the Legislature that if any one type of investment mechanism authorized in subsection (2) is held to be invalid all other valid mechanisms remain available.~~

~~(4) All loans and investments, and any income related thereto, shall be used to carry out the public purpose of ss. 288.707-288.714, which is to develop black business enterprises. This is not meant to preclude a reasonable profit for the participating black business investment corporation or for return of equity developed to the state and participating financial institutions upon any distribution of the assets or excess income of the investment corporation.~~

Section 13. Section 288.714, Florida Statutes, is amended to read:

(Substantial rewording of section. See s. 288.714, F.S., for present text.)

288.714 Quarterly and annual reports.--

(1) Each recipient of state funds under ss. 288.707-288.714 shall provide to the department a quarterly report within 15 days after the end of each calendar quarter that includes a detailed summary of the recipient's performance of the duties imposed by ss. 288.707-288.714, including, but not limited to:

(a) The dollar amount of all loans or loan guarantees made to black business enterprises, the percentages of the loans guaranteed, and the name and identification of the types of businesses served.

(b) Loan performance information.

(c) The amount and nature of all other financial assistance provided to black business enterprises.

(d) The amount and nature of technical assistance provided to black business enterprises, including technical services provided in areas in which such services are otherwise unavailable.

(e) A balance sheet for the recipient, including an explanation of all investments and administrative and operational expenses.

(f) A summary of all services provided to non-black business enterprises, including the dollar value and nature of such services and the name and identification of the types of businesses served.

(g) Any other information as required by the department by rule.

(2) By May 1 of each year, the department shall provide to the Governor, the President of the Senate, and the Speaker of the House of Representatives a detailed report of the performance of the Black Business Loan Program, including:

(a) A cumulative summary of quarterly report data required by subsection (1).

(b) A description of the strategies implemented by the department to increase private investment in black business enterprises.

(c) A summary of the Florida Black Business Investment Board, Inc.'s, performance of its duties under ss. 288.707-288.714.

(d) The most recent 5-year projection of the need for capital by black business enterprises.

(e) Recommendations for legislative or other changes to enhance the development and expansion of black business enterprises in the state.

(f) A projection of the program's activities during the next 12 months.

(3) The Florida Black Business Investment Board, Inc., and any black business investment corporation that has received state funds prior to the implementation of ss. 288.707-288.714 shall provide to the department by March 1 of each year a report with respect to the use of state funds received prior to and through the 2004-2005 fiscal year. The report must include:

(a) The number of black business enterprises that received financial assistance, including loans or loan guarantees, funded in whole or in part by the state.

(b) The number of black business enterprises receiving technical or other nonfinancial assistance from the recipient or third parties.

(c) The status of black business enterprises that have received financial or other assistance from the recipient.

(d) The total number of jobs created or maintained by black business enterprises that received financial or other assistance from the recipient.

(e) An operating statement for the recipient, including an explanation of the use of all state funds, the return on investment or interest earned on state funds, and all administrative costs of the recipient.

Section 14. Subsection (4) of section 288.9015, Florida Statutes, is amended to read:

288.9015 Enterprise Florida, Inc.; purpose; duties.--

(4) Enterprise Florida, Inc., shall incorporate the needs of small and minority businesses into the economic-development, international-trade and reverse-investment, and workforce-development responsibilities assigned to the organization by this section. ~~Where practicable and consistent with the expertise of the Black Business Investment Board, Inc.,~~ Enterprise Florida, Inc., shall collaborate ~~contract~~ with the Florida Black Business Investment Board, Inc., and the Department of Community Affairs ~~corporation~~ for the delivery of services in fulfillment of the responsibilities of Enterprise Florida, Inc., relating to small and minority businesses.

Section 15. The Office of Program Policy Analysis and Government Accountability shall prepare a status report on the initial implementation of the Florida Black Business Investment Act by the Department of Community Affairs and shall provide the report to the Governor, the President of the Senate, and the Speaker of the House of Representatives by December 1, 2007. The office shall a conduct a program review of the department's performance in meeting the goals of the Florida Black Business Investment Act and shall provide a report to the Governor, the President of the Senate, and the Speaker of the House of Representatives by December 1, 2008.

Section 16. The Auditor General shall conduct an audit of the Florida Black Business Investment Board, Inc.'s, investment activity for fiscal years 2001-2002 through 2005-2006 and report

its findings to the Governor, the President of the Senate, and the Speaker of the House of Representatives by January 1, 2007.

Section 17. Sections 288.7092, 288.7095, 288.71, 288.7101, 288.712, and 288.713, Florida Statutes, are repealed.

Section 18. The sum of $ is appropriated from the General Revenue Fund to the Department of Community Affairs for the 2006-2007 fiscal year for purposes of implementing and administering the Black Business Loan Program, and full-time equivalent positions and $ in approved salary rate are authorized.

Section 19. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1109 Title Loan Lenders
SPONSOR(S): Smith
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Economic Development, Trade & Banking Committee		Olmedillo	Carlson MHC
2) State Administration Appropriations Committee			
3) Commerce Council			
4)			
5)			

SUMMARY ANALYSIS

Chapter 537, Florida Statutes, the "Florida Title Loan Act" (the "Act"), became effective October 1, 2000. Prior to the 2000 law, title lenders could charge interest rates up to 22 percent per month. The 2000 law capped interest rates at a maximum of 30 percent per year. Subsequent to the 2000 law, title loan licensees left the state or obtained licenses under the consumer finance or deferred presentment laws. Currently, there are no lenders registered under Chapter 537, F.S. This bill would encourage the title loan industry to return to Florida.

The bill raises the maximum allowable interest rates by authorizing a title lender to compute interest rates **monthly** rather than yearly, as follows:

- 30 percent per month computed on the first $2,000 of the principal amount;
- 24 percent per month on that part of the principal amount exceeding $2,000 and not exceeding $3,000; and
- 18 percent per month on that part of the principal amount exceeding $3,000.

The bill requires additional notices in larger bold type to be included in title loan agreements.

The bill authorizes rollovers only if the borrower pays 5 percent of the unpaid balance each time.

It prohibits certain legal actions to collect a deficiency.

It also provides protection for service-members and their spouses by:
- Maintaining current interest rates applicable only to them; and
- Prohibiting a lender from taking possession of a service-member's or service-member spouse's vehicle, if the service-member is deployed to combat or combat-support posting.

The bill prohibits title loan business from being conducted with any other business.

The bill will pre-empt local government laws that more strictly regulate title loan transactions by repealing s. 537.018, F.S.

See Fiscal Comments for fiscal impact.

The bill provides an effective date of July 1, 2006

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Limited Government: The bill requires imposes new regulations on title loan lenders.

Individual Liberty: The bill will increase options for Floridians who seek short term high interest rate loans.

B. EFFECT OF PROPOSED CHANGES:

Present Situation:

Title Loans

A title loan is a "loan of money secured by a bailment of a certificate of title to a motor vehicle."[1] The Florida Title Loan Act was enacted on October 1, 2000 to regulate title loan lenders in Florida.[2] Under the Act, a title loan lender must be licensed to conduct business, to own or operate a title loan office.[3] The Office of Financial Regulation (OFR) may issue a non-transferable license for a period not to exceed 2 years to a title loan lender who files a completed application pursuant to the Act and pays the appropriate fees.[4] Each office must have a separate loan license.[5] Florida also requires that an applicant file with OFR a bond, in the amount of $100,000, or establish a certificate of deposit or irrevocable letter of credit for the amount of the bond.[6] The beneficiary of any such documents must be OFR.[7]

Agreement

Currently, a title loan lender shall execute an agreement with the borrower, which must provide certain disclosures and information, including the amount of the loan, annual percentage rate, finance charge, total amount of all payments, maturity date (30 days from the date of execution), and consequences of failing to pay under the agreement.[8]

Licensees may charge interest rates of 30 percent per annum computed on the first $2,000 of the principal amount; 24 percent per annum on that part of the principal amount exceeding $2,000 and not exceeding $3,000; and 18 percent per annum on that part of the principal amount exceeding $3,000.[9] The Act authorizes multiple rollovers for 30 day periods with the parties' mutual consent.[10]

If the consumer defaults, repossession of the vehicle is not permitted until the loan is at least 30-days overdue.[11] The title lender must also notify the borrower of the ability to pay off the loan prior to selling the vehicle.[12] The sale of the vehicle must be through a licensed motor vehicle dealer; however the title loan lender cannot also be a licensed motor vehicle dealer.[13] Any excess money from the sale of the vehicle must be returned to the borrower.[14]

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[1] *See* ch. 537, F.S.
[2] *See* Id.
[3] *See* Id.
[4] *See* Id.
[5] *See* Id.
[6] *See* ch. 537, F.S.
[7] *See* Id.
[8] *See* Id.
[9] *See* Id.
[10] *See* Id.
[11] *See* Id.
[12] *See* ch. 537, F.S.
[13] *See* Id.
[14] *See* Id.

Fees
Title loan lender application and licensee fees are as follows:

- $1200 registration fee (biennial)
- $200 investigation fee (at time of initial application)
- $1200 renewal fee
- $1200 renewal + 600 reactivation (if licensed became inactive)[15]

Violations
The Act provides a number of violations and prohibited activities, including, but not limited to fraud, misrepresentation, imposition of illegal excessive charges, failure to maintain books are records, refusal to provide information, aiding, abetting or conspiring to circumvent the Act, failing to maintain a bond, certificate of deposit or letter of credit, and failing to pay a fee as provided by the Act.[16] The Act further provides OFR with the authority to deny, revoke or suspend a license, place a licensee or applicant on probation, issue a reprimand, or impose an administrative fee if a title loan lender violations any of the foregoing prohibited activities.[17]

Remedies
The Act provides that an unlicensed title loan transaction is void, forfeiting both principal and interest.[18] In addition, a borrower who was a party to such transaction is entitled to collect attorney's fees and cost in any action to recover from the person who issued the loan.[19] Moreover, the Act provides that an unlicensed title loan lender who enters into title loan transactions commits a felony of the third degree.[20]

No State Pre-emption
The Act specifically authorizes local governments to enact stricter laws governing these transactions.[21]

Florida Consumer Finance Act
Under Chapter 516, F.S, the Florida Consumer Finance Act, a consumer can borrow up to $25,000 at the same rates of interest rates provided under the current Title Loan Act (i.e., maximum of 30% per year.)[22] The Office currently licenses over 500 locations under Chapter 516. License fees under the Consumer Finance Act are significantly lower than those required by the Title Loan Act. Under the Consumer Finance Act, license fees are $825 for initial applications and $625 for renewals.[23] Under the Title Loan Act, license fees are $1,400 for initial applications and $1,200 for renewals.[24] Additionally, the Consumer Finance Act requires a $25,000 bond per location; whereas, the Title Loan Act requires a $100,000 bond per location.[25]

Deferred Presentment Transactions
Deferred presentment transactions, known as "payday loans," are short term, high interest rate consumer loans. The Deferred Presentment Act (Act),[26] which was enacted in 2001, provides requirements that apply to check cashing operations. Any person engaged in a deferred presentment transaction (deferred presentment provider[27]) must register with OFR and is subject to its regulation.[28]

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[15] *See* Id.
[16] *See* Id.
[17] *See* Id.
[18] *See* ch. 537, F.S.
[19] *See* Id.
[20] *See* Id.
[21] *See* s. 537.018, F.S. *See also* s. 494.00797, F.S.
[22] *See* s. 516.031, F.S.
[23] *See* s. 516.003, F.S.
[24] *See* s. 537.005, F.S.
[25] *See* Id.
[26] *See* Part IV of chapter 560, F.S.
[27] Deferred presentment providers are more commonly known as "pay-day lenders." Deferred presentment providers are businesses that charge a fee for cashing a customer's check and agreeing to hold that check for a certain number of days prior to depositing or redeeming the check. *See* Section 560.402(6), F.S.
[28] *See* Section 560.403, F.S.

The maximum face amount of a check taken for deferred presentment cannot exceed $500, excluding allowable fees.[29] The maximum fee is 10 percent of the face amount, plus a maximum $5.00 verification fee.[30] Upon receipt of the customer's (drawer[31]) check, the deferred presentment provider must immediately provide the drawer with the amount of the check, minus the allowable fees. The deferred presentment agreement may not be for a term in excess of 31 days or less than seven days.[32] The provider cannot renew or extend any transaction (rollover) or hold more than one outstanding check for any one drawer at any one time.[33]

A deferred presentment provider cannot enter into a transaction with a person who has an outstanding transaction with any other provider, or with a person whose previous transaction with any provider was terminated in less than 24 hours.[34] To verify such information, the provider must access a database established by OFR[35] and must submit the following data on each transaction:

- Drawer's name, address, and drivers' license number;
- Drawer's social security or employment authorization alien registration number;
- Drawer's date of birth;
- Amount and date of the transaction;
- Date the transaction is closed; and
- Check number.[36]

For a $500 payday loan with a term of 30 days, the consumer would pay $55 in fees, which is an effective rate of interest of 134%. By contrast, in a title loan, which is secured by the consumer's vehicle, the cost of borrowing the money would $125 and the effective rate of interest would be 264%. Additional fees and costs would also be applicable in a title loan transaction if the borrower was unable to repay the debt and the lender sold the borrower's vehicle to recover the debt.

Payday lenders are prohibited from taking additional collateral and engaging in rollover transactions.[37] Other consumer protections for payday loans include a 24-hour waiting period between transactions.[38] There is also a 60-day grace period if the consumer notifies the vendor before the due date that the consumer is unable to make the check good.[39] In these cases, the consumer must participate in credit counseling in order to be afforded the grace period.[40] The Office maintains a state-wide database to ensure that consumers do not have more than one outstanding payday loan at any one time and that they adhere to the 24-hour waiting period.[41]

The Office currently licenses over 1,200 payday lender locations.

Effects of Proposed Changes:

Notice

The bill requires additional notices in larger type to be included in title loan agreements, stating that the loan is not intended to meet long-term financial needs; that the loan should only be used to meet short-term cash needs; that the borrower will be required to pay additional interest and fees if he or she

[29] *See* Section 560.404(5), F.S.
[30] *See* Section 560.404(6), F.S. The maximum $5.00 verification fee is established by Rule 69V-560.801, Fla. Admin. Code, as authorized by s. 560.309(4), F.S.
[31] A drawer is a person who writes a personal check and upon whose account the check is drawn. Section 560.402(7), F.S.
[32] *See* Section 560.404(8), F.S.
[33] *See* Section 560.404(18), F.S.
[34] *See* Section 560.404(19), F.S.
[35] OFR is required to establish this database of all deferred presentment transactions in the state and give providers real-time access through an Internet connection. OFR contracts with a private vendor, Veritec Solutions, Inc., to maintain the database. Senate Staff Analysis and Economic Impact Statement for S 7072, prepared by Banking and Insurance Committee, January 26, 2006, at 4.
[36] Section 560.404(23), F.S. All of the information is required by statute, except the drawer's date of birth and check number. Telephone conversation with staff of OFR, January 27, 2006.
[37] *See* s. 560.404, F.S.
[38] *See* Id.
[39] *See* Id.
[40] *See* Id.
[41] *See* Id.

renews the loan; that the loan is a higher interest rate loan; that the borrower is placing at risk his or her continued ownership of the pledged personal property; that if the borrower fails to pay the full amount of the loan on or the end of the maturity date or renewal of the loan, the title pledge lender may take possession of the property the title for which is pledged and sell the property in the manner provided by law; and that the borrower has a legal right of rescission.

Increase in Interest Rates
The bill raises the maximum allowable interest rates from the present rate of 30 percent per annum on the first $2,000 of the principal amount to 22 percent per month; from 24 percent per annum to 20 percent per month on that part of the principal amount exceeding $2,000 and not exceeding $3,000; and from 18 percent per annum to 18 percent per month on that part of the principal amount exceeding $3,000. However, it requires additional disclosures in title loan agreements and maintains the current interest rate limitations for members of the United States Armed Forces and their spouses.

Rollovers
The bill authorizes rollovers only if the borrower pays at least 5 percent of the original unpaid balance each time a rollover occurs. The lender **may**, but is not obligated to, defer any required principal reduction payments and collect it at the time the loan is finally paid off; however, the lender can not charge any additional interest on the deferred principal amounts.

Prohibited Actions
The bill prohibits legal actions to recover deficiency balances. In addition, the bill prohibits the title lender from taking possession of a vehicle of a service-member or spouse of a service-member, if the service-member is deployed to a combat or combat–support posting. Moreover, title lenders may not contact the commanding officer of a service-member or spouse about a title loan or do business with a service-member if the commanding officer declares the specific location off-limits and notifies the business. The bill also prohibits title loan lenders from conducting title loan business within any location in which any other business is solicited, conducted, or to conduct title loan business in association or conjunction with such other business, or share common areas or employees with any other business.

State Pre-emption
The bill will pre-empt local government laws that more strictly regulate title loan transactions by repealing s. 537.018, F.S.

C. SECTION DIRECTORY:

Section 1. Amends s. 494.00797, F.S., removing local government authority to regulate title loans.

Section 2. Amends s. 537.008, F.S., requiring certain disclosures.

Section 3. Amends s. 537.011, F.S., regarding interest rates and limitations.

Section 4. Amends s. 537.012, F.S., tolling time requirements for the military in the event of title lender repossession and title lender disposal of pledged property.

Section 5. Amends s. 537.013, F.S., relating to title loan lender prohibited acts, including prohibition regarding legal actions to collect deficiency balances and prohibitions against military.

Section 6. Creates s. 537.019, F.S., prohibiting conducting title loan business with another business.

Section 7. Repeals s. 537.018, F.S., to pre-empt local laws regarding title loans.

Section 8. Provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE AGENCIES:	(FY 06-07) Amount / FTE	(FY 07-08) Amount / FTE	(FY 08-09) Amount / FTE
1. Revenues			
Regulatory Trust Fund			
a. Recurring *	720,000	150,000	1,020,000
b. Non-Recurring *	120,000	25,000	25,000
Total Revenue	840,000	175,000	1,045,000
2. Expenditures:			
Regulatory Trust Fund			
a. Recurring	648,945 / 10	648,945 / 10	648,945 / 10
b. Non-Recurring	57,830		
Total	706,775 / 10	648,945 / 10	648,945 / 10

B. ESTIMATED FISCAL IMPACT ON LOCAL GOVERNMENTS:

None.

C. ESTIMATED FISCAL IMPACT ON PRIVATE SECTOR:

The proposed bill will significantly impact consumers who make use of these loans. Currently, the maximum interest rate allowed is 30% per **annum**. The bill will increase the maximum permissible rate to 22% per **month** on loans up to $2000, 20% per **month** on loans between $2000 and $3000, and 18% per **month** on loans between $3000 and $5000.

D. FISCAL COMMENTS:

The Office of Financial Regulation projections are based on the 600 applicants requesting registration in FY 06-07 (shortly after the effective date of the proposed bill), with 125 new applications per year in remaining years. The registration fee is $1200 (biennial) plus $200 investigative fee. All active registrants would be required to renew in FY 08-09. Based on the allowable interest rates, growth in the industry is anticipated but the level of growth is not known at this time. Currently there are no lenders registered under Chapter 537, FS.

Based on the estimate of 600 initial applicants/registrants, the Office anticipates it would require a total of 10 FTEs to regulate title lending as proposed by the bill. Staff would be needed to review and process applications for registration, and would be placed around the State to examine the on-going operations and investigate consumer complaints related to title loans.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other: None.

B. RULE-MAKING AUTHORITY: None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

OFR opposes this bill because of the high rates of interest and a comparative lack of consumer protections compared to payday loans, for example. According to OFR, authorizing title loans at the interest rates provided in the bill could have adverse effects on consumers. In 2004, New Mexico regulators reported that the average income of title loan borrowers in that state, as reported by licensees, was $21,818.[42] It has been reported that these types of loans are often made without consideration of the consumer's ability to repay, resulting in many loans being renewed month after month in order to avoid repossession.[43] Consumers who enter into these transactions risk losing a valuable asset and also potentially the ability to maintain transportation and employment.

High rates may attract more businesses; however, high rates may also push consumers deeper into debt. Below is a chart showing what a consumer would pay in interest on a title loan that was renewed six times.

Legislation	Loan Amount	Interest	# of Payments	APR
Current Law	$2,000	$300	6	30%
Proposed	**$2,000**	**$2,331**	**6**	**264%**
Current Law	$3,000	$420	6	28%
Proposed	**$3,000**	**$3,574**	**6**	**270%**
Current	$5,000	$624	6	25%
Proposed	**$5,000**	**$5,608**	**6**	**253%**

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.

[42] Consumer Federation of America, "Driven into Debt: CFA Car Title Loan Store and Online Survey" (November 2005) at 3, provided by OFR.
[43] *See* Id.

A bill to be entitled

An act relating to title loan lenders; amending s. 494.00797, F.S.; including title loan lenders within a prohibition against counties and municipalities regulating certain entities subject to the jurisdiction of the Office of Financial Regulation of the Financial Services Commission; amending s. 537.008, F.S.; specifying information to be printed in title loan agreements; amending s. 537.011, F.S.; revising maximum interest rates chargeable on title loans; providing alternative requirements for title loans made to certain military personnel; providing limitations; requiring the commission to establish rules for rates; providing payment requirements for title loan borrowers; providing interest and fee calculation methodologies; providing criteria and limitations for deferring required principal payments; amending s. 537.012, F.S.; providing for tolling certain title loan payment time requirements for certain military personnel; amending s. 537.013, F.S.; specifying an additional prohibited activity by a title loan lender; prohibiting certain activities by a title loan lender relating to military personnel; providing penalties; creating s. 537.019, F.S.; prohibiting title loan lenders from engaging in certain business activities; repealing s. 537.018, F.S., relating to preserving authority for more restrictive county or municipal ordinances; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (1) of section 494.00797, Florida Statutes, is amended to read:

494.00797 General rule.--All counties and municipalities of this state are prohibited from enacting and enforcing ordinances, resolutions, and rules regulating financial or lending activities, including ordinances, resolutions, and rules disqualifying persons from doing business with a city, county, or municipality based upon lending interest rates or imposing reporting requirements or any other obligations upon persons regarding financial services or lending practices of persons or entities, and any subsidiaries or affiliates thereof, who:

(1) Are subject to the jurisdiction of the office, including for activities subject to this chapter~~, except entities licensed under s. 537.004~~;

Proof of noncompliance with this act can be used by a city, county, or municipality of this state to disqualify a vendor or contractor from doing business with a city, county, or municipality of this state.

Section 2. Paragraph (c) of subsection (2) of section 537.008, Florida Statutes, is amended to read:

537.008 Title loan agreement.--

(2) The following information shall also be printed on all title loan agreements:

(c)1. The following statement in not less than 12-point type that:

a.~~1.~~ If the borrower fails to repay the full amount of the title loan on or before the end of the maturity date or any extension of the maturity date and fails to make a payment on the title loan within 30 days after the end of the maturity date or any extension of the maturity date, whichever is later, the title loan lender may take possession of the borrower's motor vehicle and sell the vehicle in the manner provided by law. If the vehicle is sold, the borrower is entitled to any proceeds of the sale in excess of the amount owed on the title loan and the reasonable expenses of repossession and sale.

b.~~2.~~ If the title loan agreement is lost, destroyed, or stolen, the borrower should immediately so advise the issuing title loan lender in writing.

2. The following statements in not less than 14-point bold type:

a. This loan is not intended to meet long-term financial needs.

b. You should use this loan only to meet short-term cash needs.

c. You will be required to pay additional interest and fees if you renew this loan rather than pay the debt in full when due.

d. This loan is a higher interest loan. You should consider lower cost loans which may be available to you.

e. You are placing at risk your continued ownership of the personal property the title for which you are pledging for this loan.

f. If you fail to repay the full amount of this loan on or

before the end of the maturity date or renewal of the loan, the title pledge lender may take possession of the property the title for which is pledged and sell the property in the manner provided by law.

g. If you enter into a title pledge agreement, you have a legal right of rescission. This means you may cancel your contract at no cost to you by returning the money you borrowed by the next business day after the date of your loan.

All owners of the titled personal property must sign the title loan agreement.

Section 3. Subsections (1) and (2) of section 537.011, Florida Statutes, are amended, and subsections (6) and (7) are added to that section, to read:

537.011 Title loan charges.--

(1) Except as provided in paragraph (6)(a), a title loan lender may charge a maximum interest rate of 22 ~~30~~ percent per month ~~annum~~ computed on the first $2,000 of the principal amount, 20 ~~24~~ percent per month ~~annum~~ on that part of the principal amount exceeding $2,000 and not exceeding $3,000, and 18 percent per month ~~annum~~ on that part of the principal amount exceeding $3,000. The original principal amount is the same amount as the amount financed, as defined by the federal Truth in Lending Act and Regulation Z of the Board of Governors of the Federal Reserve System. In determining compliance with the statutory maximum interest, the computations must be simple interest and not add-on interest or any other computations. When two or more interest rates are to be applied to the principal

amount, the lender may charge interest at that single monthly ~~annual~~ percentage rate which, if applied according to the actuarial method to each of the scheduled periodic balances of principal, would produce at maturity the same total amount of interest as would result from the application of the two or more rates otherwise permitted, based upon the assumption that all payments are made as agreed.

(2) The annual percentage rate that may be charged for a title loan may equal, but not exceed, the annual percentage rate that must be computed and disclosed as required by the federal Truth in Lending Act and Regulation Z of the Board of Governors of the Federal Reserve System. The maximum annual percentage rate of interest that may be charged is 12 times the maximum monthly rate~~, and the maximum monthly rate must be computed on the basis of one twelfth of the annual rate for each full month~~. The commission shall establish by rule the rate for each day in a fraction of a month when the period for which the charge is computed is more or less than 1 month.

(6)(a) The title loan lender shall determine whether the borrower is a member of the military services of the United States. If the borrower is a member of the military services of the United States or the spouse of a member of the military services of the United States, a title loan lender may charge a maximum interest rate of 30 percent per annum computed on the first $2,000 of the original principal amount, 24 percent per annum on that part of the original principal amount exceeding $2,000 and not exceeding $3,000, and 18 percent per annum on that part of the original principal amount exceeding $3,000. The

original principal amount is the same amount as the amount financed, as defined by the federal Truth in Lending Act and Regulation Z of the Board of Governors of the Federal Reserve System. In determining compliance with the maximum interest specified by this subsection, the computations must be simple interest. Add-on interest or any other computations may not be used. When two or more interest rates are to be applied to the original principal amount, the lender may charge interest at that single annual percentage rate which, if applied according to the actuarial method to each of the scheduled periodic balances of principal, would produce at maturity the same total amount of interest as would result from the application of the two or more rates otherwise permitted, based upon the assumption that all payments are made as agreed.

(b) The annual percentage rate that may be charged for a title loan to a member of the military services of the United States or the spouse of a member of the military services of the United States may equal, but not exceed, the annual percentage rate that must be computed and disclosed as required by the federal Truth in Lending Act and Regulation Z of the Board of Governors of the Federal Reserve System. The maximum annual percentage rate of interest that may be charged is 12 times the maximum monthly rate, and the maximum monthly rate must be computed on the basis of one-twelfth of the annual rate for each full month. The commission shall establish by rule the rate for each day in a fraction of a month when the period for which the charge is computed is more or less than 1 month.

(7) Notwithstanding any other provision of this chapter,

beginning with the first renewal or continuation and at each successive renewal or continuation thereafter, the borrower shall make a payment of at least 5 percent of the original principal amount of the title pledge transaction in addition to interest and fees authorized by this chapter. Interest and fees authorized by this chapter at each successive renewal or continuation shall be calculated on the outstanding principal balance. Principal payments in excess of the required 5-percent principal reduction shall be credited to the outstanding principal on the day received. If, at the maturity of any renewal requiring a principal reduction, the borrower has not made previous principal reductions adequate to satisfy the current required principal reduction and the borrower cannot repay at least 5 percent of the original principal balance and any outstanding interest and fees authorized by this chapter, the title loan lender may, but is not obligated to, defer any required principal payment until the end of the title loan agreement. No further interest or fees may accrue on any such principal amount deferred.

Section 4. Subsection (8) is added to section 537.012, Florida Statutes, to read:

537.012 Repossession, disposal of pledged property; excess proceeds.--

(8) If a borrower who is an active member of the military services of the United States has been deployed to a combat or combat support posting or is a member of the Reserves or National Guard and has been called to active duty, the time requirements set forth in subsections (1), (2), and (3) are

tolled for the duration of the deployment or active duty service.

Section 5. Paragraph (o) is added to subsection (1) of section 537.013, Florida Statutes, and subsection (3) is added to that section, to read:

537.013 Prohibited acts.--

(1) A title loan lender, or any agent or employee of a title loan lender, shall not:

(o) Sue for deficiency balances if the sale of the titled personal property is less than the principal amount due on the loan.

(3) If a title loan lender transacts a title loan with a member of the military services of the United States, the lender shall not:

(a) Take possession of a vehicle of the member or the spouse of such member when the member has been deployed to a combat or combat support posting or is a member of the Reserves or National Guard and has been called to active duty for the duration of the deployment or active duty service;

(b) Contact the commanding officer of a borrower who is a member of the military services of the United States or anyone in the borrower's chain of command in an effort to collect on an obligation under a title loan transaction entered into with the member or the member's spouse; or

(c) Enter into a title loan agreement with a member of the military services of the United States if a military base commander has declared that a specific location of the title

loan lender's business is off limits to military personnel and has formally notified the title loan lender of such declaration.

Section 6. Section 537.019, Florida Statutes, is created to read:

537.019 Conducting business with another business.--A title loan lender may not conduct the business of making title loans under this act within any office, room, suite, or place of business in which any other business is solicited or engaged in, or in association or conjunction with such other business, or share common areas or employees with any other business.

Section 7. Section 537.018, Florida Statutes, is repealed.

Section 8. This act shall take effect July 1, 2006.